EASTERN WASHINGTON

Growth Management Hearings Board

Digest of Decisions

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Eastern Washington Digest of Decisions

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180 Days

- The Board holds that there are five prerequisite conditions that must be met before it will consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be preserved. Second, all the parties must jointly make the motion. Third, granting the motion will not bar or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may terminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB 95-1-0007, Motion Order Granting Continuance (Jan.18, 1996).

- The Board concludes that the legislature intended the word "shall," as used in RCW 36.70A.300(1), to be directory, thus allowing parties to waive their right to a decision within 180 days. *Kittitas County v. City of Ellensburg*, EWGMHB 95-1-0007, Motion Order Granting Continuance (Jan. 18, 1996).

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the FUGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

Accessory Dwelling Units (ADU)

- RCW 36.70A.400 states that any local government that is planning under the Housing Policy Act shall comply with RCW 43.63A.215(3). The Board finds that RCW 43.63A.215, when read as a whole, requires local governments to adopt development regulations, zoning regulations or official controls that provide for accessory dwelling units in areas zoned for single-family residential use by December 31, 1994. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB 95-1-0001, Dispositive Motion and Final Order (Jun. 6, 1995).

- A statutory interpretation that does not require the local governmental entity to adopt an ADU regulation or control runs against the legislature's stated intent. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB 95-1-0001, Dispositive Motion and Final Order (Jun. 6, 1995).

- The Housing Policy Act places a mandate on a city separate from, and additional to, the GMA, and requires every city with a population of twenty thousand or more to pass an ADU

regulation or control by the end of 1994. *Coalition of Responsible Disabled v. City of Spokane,* EWGMHB 95-1-0001, Dispositive Motion and Final Order (Jun. 6, 1995).

Adoption

- WAC 365-195-805(3) states:

  "(3) Adoption schedule. The strategy should include a schedule for the adoption or amendment of the development regulations identified. Individual regulations or amendments may be adopted at different times. However, all of the regulations identified should be adopted by the applicable final deadline for adoption of development regulations."

  While it may have been appropriate to adopt the development regulations more timely, the language in WAC 365-195-805(3) is directive only. Words "should" and "may" be do not have the same weight as words like "shall". 00-1-0001: Concerned Friends of Ferry County v. Ferry County; Final Decision and Order, July 6, 2001

- RCW 36.70A.040(4)(d) states:

  "...the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations."

  The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs,(Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". 00-1-0001: Concerned *Friends of Ferry County v. Ferry County*; Final Decision and Order;(Jul.6,2000)

Agricultural Lands

- The Board agrees with the County's contentions regarding ten and twenty acre lots as part of the protected agricultural lands designation. If small lots were allowed throughout the agricultural zones, clearly, the agricultural lands and industry would not be protected. However, small agricultural lots are of increasing importance in many areas of our State, including Walla Walla County. Agricultural activities found on small lots are definitely becoming more common and have long-term commercial significance and deserve protection. The Board recognizes that not all these parcels will be used for production, but

their potential for future production purposes needs to be preserved. The Board complements the County for this foresight. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The Superior Court of Walla Walla County remanded to this Board a portion of the Final Decision and Order in *City of Walla Walla v. Walla Walla County,* No. 02-1-0012c. This Board was directed by the court to "make findings as to any legal or factual basis for not allowing use of Walla Walla County's CUP process in making such threshold determinations, including whether the mandated conservation, maintenance, and enhancement of the agricultural industry is being complied with, and whether any 'innovative zoning techniques' under RCW 36.70A.177 are applicable." (Walla Walla County Superior Court, *Walla Walla County v. Eastern Washington Growth Management Hearings Board,* No. 02-2-00784-9, April 21, 2003). The Board is to consider whether the County's use of its CUP process and its standards to make a "threshold" decision on the siting of these challenged uses, protects agricultural lands of long-term commercial significance such that the regulations comply with the GMA. The Board finds that it does not. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The CUP is written in general language and in no way directs that only lands with poor soil be considered for conversion to the above uses. The County asks the Board to recognize an affidavit submitted by their interim Director of Regional Planning for Walla Walla County as the County's "law" limiting the conversion only to lands with poor soil. That affidavit and its correction purport to establish the criteria for permitting conversion of these lands to non-agricultural uses. However, even the affidavit is unclear. Nowhere in the County's DRs, CP or CUP is there a requirement that such a non-agricultural use be on lands of poor soil or soil not suitable for agricultural purposes. The affidavit of Kenneth Kuhn, the acting Director of Regional Planning, also does not make it clear that applications will be rejected if the soil is not poor or unsuited for agricultural purposes. A person may infer that is the case, but it is unclear. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- Each of these are documents that may show the intention of the County, but are not required by or contained in the County's Comprehensive Plan or the Development Regulations which authorize this conversion of Agricultural lands. The Regulations that do exist are those that authorize the change of use on all but Primary Significance or Unique farmlands. With no regulations to address the specific criteria of this conversion, the landowner is told only that the CUP process is to be used. That process makes no mention of agricultural lands nor does it include standards or criteria, which would limit or guide the landowner or the County. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF*

WASHINGTON, Petitioner v. WALLA WALLA COUNTY, Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The actions of the County are non-reviewable by the Growth Management Hearings Boards unless they are found in the County's Comprehensive Plan or Development Regulations. RCW 36.70A.280(a). The Board looks at the development regulations developed by the County for review of the applications for non-agricultural development upon agricultural lands. The County has stated on the record that it is their intent to allow only non-productive or poor agricultural soil/lands to be converted in this manner. However, nowhere does this criteria or standard exist in their Comprehensive Plan or Development Regulations. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The Growth Management Act requires the County to identify and preserve Agricultural Lands of Long-term commercial Value. The County has identified a large portion of their lands as such, 92%. This is admirable. We recognize that such a whole scale designation was a precautionary step. It is quite possible that, upon detailed examination, some of these lands might not qualify as Agricultural Resource Lands. However, the County must have a compliant procedure allowing the consideration of other uses of this land if it were believed that particular lands were in fact not viable agricultural lands and compatible with the agricultural uses around it. If this is what the County desires to do, the County must adopt a procedure allowing the careful examination of the subject parcel and the redesignation of such parcel only if it is found to be poor soil and unsuited for agricultural use and compatible with the agricultural uses around it. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The County has not gone far enough. The County allows the conversion of these lands yet establishes no criteria or standards giving the landowner an understanding of its application. The reference to "in conformance with the comprehensive plan." 17.40.020(A)(3) does not clarify the meaning of the statute or provide the criteria needed. The County's Comprehensive Plan requires the protection of agriculture resource lands, but gives no direction to the landowner as to how a change of use could take place. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The Board agrees with the County's contentions regarding ten and twenty acre lots as part of the protected agricultural lands designation. If small lots were allowed throughout the agricultural zones, clearly, the agricultural lands and industry would not be protected. However, small agricultural lots are of increasing importance in many areas of our State, including Walla Walla County. Agricultural activities found on small lots are definitely becoming more common and have long-term commercial significance and deserve protection. The Board recognizes that not all these parcels will be used for production, but their potential for future production purposes needs to be preserved. The Board complements the County for this foresight. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Board in the case *Wenatchee Valley Mall Partnership v. Douglas County, EWGMHB* 96-1-0009 has recognized clustering as an acceptable technique to preserve large-tract agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which enable agricultural production. Clustering of homes, along with relatively large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Respondent does not contend that 2 ½ acre lots will protect agricultural lands, or in any way preserve these lands for agricultural use. Rather, they argue that tax incentives alone will keep these lands available for agricultural productions. The Board rejects that argument. Ferry County has an "affirmative duty" to protect designated agricultural lands. Allowing those lands to be divided into 2 ½ acre lots simply does not protect those lands for agricultural use. The tax incentives alone are insufficient to protect agricultural lands.
  The 2.5-acre minimum lot size as applied to agricultural resource lands in Ferry County, fails to comply with the affirmative duty to conserve and protect agricultural resource lands to assure the maintenance of the agricultural industry. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- Yakima County is required to designate and conserve agricultural resource lands within their jurisdiction. Thus, there can be no dispute that the GMA mandates Counties to take action to conserve their agricultural lands. As this Board has found before, local governments are required to "make efforts to include, rather than exclude, agricultural lands, preserving those parcels for future natural resource-based industries." Grant County. Supra. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton,* EWGMHB, 02-1-0008, Final Decision and Order, (November 4,2002).

- This Board has also found that agricultural lands are not "conserved" if they are not "maintained." *English v. Columbia County*, EWGMHB No. 93-1-0002 (FDO, November 12, 1993, (defining "conservation" to mean "intended to maintain agricultural and forest resource lands*."); Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB No. 94-1-0015 (FDO, August 8, 1994.) *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Final Decision and Order, (November 4,2002).

- The Board notes the Caton property has been in the Conservation Reserve Program (CRP) for the best part of the past 20 years. This is through the Farm Service Agency with the USDA. The CRP is a voluntary program that offers annual payments, incentive payments and annual maintenance payments for certain activities, and cost-share assistance to establish approved cover on eligible cropland. The program encourages farmers to plant long-term resource-conserving covers to improve soil, water, and wildlife resources. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Final Decision and Order, (November 4,2002).

- While any Reclamation water does not serve this land, this Board has found in several cases that agricultural land of long-term significance does not have to be irrigated lands. This Board has stated that junior water rights and non-irrigated lands can be as productive if not more productive than lands that are irrigated. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton,* EWGMHB, 02-1-0008, Final Decision and Order, (November 4, 2002).

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled to find the County is out of compliance. King County, in that case, greatly limited the uses, prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.
  In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of he Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." Id p. 142. The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" id p.142. The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Id p. 142. Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." P.143.
  As in the King County case above, we find here " the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra,* P.142.

While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The Board finds the Supreme Court ruling in *King County v. CPSGMHB*, 142 Wn.2d 543, 562 (2000) compelling: counties must preserve agricultural lands as directed by the Growth Management Act. Intervenor's arguments seem to overlook the fact that the County designated the subject property as agricultural land of long-term significance; the Board did not. The question addressed by the Board is "Was this de-designation of agricultural Resource Land appropriate?" The Board concluded the County was not correct in that de-designation, and did not establish an adequate basis for removing that designation. The County argues three factors as their justification for removing the land from protected status: 1) to correct an obvious mapping error; 2) to better implement the Comprehensive Plan; and 3) a need for more Rural Self-Sufficient zoned lands. The County and Intervenor fail to convince the Board in all three factors. The record does not support a need for more 5-acre lots in Yakima County. The Record holds no support for an argument that dividing an existing farm into 5-acre lots better implements the Comprehensive Plan. Nor does the record establish any obvious mapping error in the original designation. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Order on Motion for Reconsideration, (December 2, 2002).

- The Growth Management Act, with further direction from the Supreme Court, mandates the preservation of farmlands. This mandate is not limited to flat land, or irrigated land, or prime or unique soils. The County has designated the subject land as agricultural land of long-term commercial significance. It has not established a basis to conclude that designation was in error. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Order on Motion for Reconsideration, (December 2, 2002).

- The Board in the case Wenatchee Valley Mall Partnership v. Douglas County, EWGMHB 96-1-0009 has recognized clustering as an acceptable technique to preserve large-tract agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which enable agricultural production. Clustering of homes, along with relatively large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Clustering is only appropriate for lands not designated for agriculture, forest, or mineral resources. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *Merrill H. English and Project for Informed Citizens v.*

Board of County Commissioners of Columbia County, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The second edition of the Random House Dictionary of the English Language defines "conservation" as 1) "the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion." Thus, conservation prevents the loss or degradation of the resource. Using this definition, we hold "conservation" as used in RCW 36.70A.060 is intended to maintain agricultural and forest resource lands. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- Unlike a dry land wheat area, for instance, where all the land in a particular area may be dedicated to a particular crop or use, the orchard area in Chelan County is both diverse and complex. The land classifications change rapidly and often in the extreme. Blocking off whole areas may be too blunt an agricultural-lands designation tool. Using appropriate performance criteria as an alternative designation tool would provide flexibility to deal with non-qualifying lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- While there is opportunity for the exercise of local judgment, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The Growth Management Act specifically differentiates between agricultural resource lands and rural lands. County residents who desire a rural lifestyle should have the opportunity to purchase rural home sites in rural areas that do not have long-term commercial value as agricultural land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- All counties, whether planning or non-planning, must designate agricultural resource lands and critical areas. All counties must protect critical areas. These designations and protections provide the basis for further planning. *Save Our Butte Save Our Basin Society, et al. v. Chelan County,* EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The basic requirements for designation of agricultural resource lands under RCW 36.70A.170(1) are provided in the definitions of the terms "agricultural land" and "long-term commercial significance." *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The question of compliance with RCW 36.70A.020(2) (sprawl) is not whether development should be precluded from agricultural resource lands, but the nature of the allowed development. Property developments, which support the agricultural industry, and these encompass a wide range of uses, are necessary for its future vitality. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the Ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- Parks, playgrounds, public schools, and libraries do not appear to be compatible with commercial agriculture. Additional uses that would not be compatible with commercial agriculture include hospitals, convalescent homes, and day care facilities. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The Board recognizes that there are many uses, which, if located in a designated agricultural area, would be detrimental to the agricultural industry. Indeed, many uses are simply incompatible with commercial agriculture, a hospital, for instance. It is important to note that production practices of commercial agriculture are not always bucolic, even though for large parts of the year they may seem to be. Commercial agriculture as practiced today is an industrial activity, often necessitating precise chemical applications and work regimes encompassing all hours of the day. When conflicts arise with other uses in an agricultural area, the agricultural viability of the area often goes down. Over time, the cumulative burden becomes unbearable for some producers, resulting in further conversion of agricultural lands and ever-greater burdens on the remaining producers. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The important concern is the non-agricultural impact of non-exclusive zoning, by which we mean the cumulative impact of non-agricultural related activities on the designated agricultural area. In many cases it is a proposed development's level of impact and purpose that is determinative of whether it should be allowed or not. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).
- In order to maintain the industry, it is necessary to designate and conserve a "critical mass" of the agricultural resource land. The Board defines "critical mass" as that quantity of resource land necessary to assure survival of the agricultural support system, the suppliers, processors and marketing structures, required for survival of the agricultural industry in the county. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- A county has a range of discretion in making this determination of the critical mass of agricultural land and the extent of any particular designation may vary from county to county

depending on the level of protection above the minimum requirement they choose to grant the industry, but the baseline test is always whether the land is commercially significant over the long-term. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The term "long-term commercial significance" establishes criteria for agricultural land. It fundamentally concerns the land's growing capacity and productivity, as measured by the Soil Conservation Service land-capability classification system. The test is the land's ability to commercially produce crops, rather than the profitability of any crop or farm. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- While the GMA requires the conservation of agricultural lands of long-term commercial significance, it does not, and cannot, prohibit rezone actions. Any rezone, of course, would be subject to compliance with approved comprehensive plans, and the goals of the Growth Management Act. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- One of the purposes of the GMA is to encourage preservation of agricultural lands. If the landowner perceives a potential for a higher use allowable by the county, that perception itself will increase land prices to ensure the land is no longer economically viable for agricultural purposes. While this Board will not suggest what economic criteria should apply in permitting a landowner to opt out, that criteria must be based on something other than the landowner's perception of what is in his short-term economic interest, and on perceptions of what other uses may be allowed on the land. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- Counties are required to designate agricultural lands that have long-term significance for the commercial production of food or other agricultural products. The requirement to adopt a comprehensive plan is in a separate section of the Act. The requirement to designate and conserve agricultural land is not an interim requirement, valid only until the local agency adopts a comprehensive plan. When the comprehensive plan is being adopted, the county is to review the designations and development regulations and insure they are consistent with the plan. The designations are separate requirements under the GMA and can be reviewed by the Board in a separate action. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order on Compliance on Agricultural Lands of Long-Term Commercial Significance Designation and Criteria (May 27, 1997).

- RCW 36.70A.170, RCW 36.70A.030(2) and (11), WAC 365-190-050, legislative history, and the Supreme Court decision in *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38 (1998), direct the county to designate a critical mass of lands to preserve the agricultural industry, not just a few acres of land in token compliance. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The county's agricultural lands designation criterion, that parcel size must be a minimum of twenty acres in size, is not appropriate. A more appropriate acreage criterion would consider ownership and management patterns, not simply assessor's parcel size. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- Current land use is not controlling in designating agricultural lands. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- In designating agricultural land, counties shall consider a multitude of factors and not decide solely on one element. Counties cannot use one element on the list of criteria to exclude, but must consider all elements. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The Board has already found senior water rights were not a valid criterion in designating agricultural lands where the evidence did not show a significant difference in productivity. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- Richard L. Settle & Charles G. Gavigan, in "The Growth Management Revolution in Washington: Past, Present and Future," 16 U Puget Sound L. Rev., p.67 at 907 (1993) states: "…natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource based industries that depend on them. Allowing conversion or resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."

  In Redmond v. Central Puget Sound Growth Hearings Board, 136 Wash. 2nd 38, 8/6/98, the Washington Supreme Court considered the issue of whether an owner's current or intended use of land was a conclusive factor in determining whether property is "agricultural land" under RCW 36.70A.030(2). The court found, in designating property as agricultural resource land under GMA, neither the current use nor the owner's intended use of the property is determinative. The court noted if current uses were a criterion, GMA Comprehensive Plans would not be plans at all, but "mere inventories of current land uses."

  The court further found, if the landowners intended use were a criterion, local jurisdictions would be powerless to preserve natural resource lands: "presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture". Redmond, supra, at 52. The Court found there are two elements of the statutory definition of agriculture land contained in RCW 36.70A.030: (1) that the land be primarily devoted to agricultural purposes; and (2) that the property has long-term commercial significance for agricultural production.

  The Redmond court held "…land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where land is actually used or capable of being used for agricultural production…" The land in this case has long been zoned for agricultural use. While the land use on a particular parcel and the owner's intended uses for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor landowner intent of the particular parcel is conclusive for purposes of this element of the statutory definition. Redmond, supra at 53.

  The Belaire property has been used for hay and alfalfa production. It is bordered on two sides by land in active hop production. It has been zoned agricultural since 1982 and has been designated agricultural resource land since the beginning of Yakima County's GMA planning process. When considering these elements the County must balance interests and make value judgments. The County has found the Belaire property has some prime

agricultural soil, that there are no public facilities available and very few public services. This is a case where the County could have chosen to designate this property as agricultural resource land or Rural Self-sufficient lands as the Petitioners requested. This Board will not substitute its judgment for that of the County. The Legislature and the courts have been very clear on this issue. *Victor W. Belaire et. al. v. Yakima County,* **(Belaire v. Yakima County),** EWGMHB Case No. 99-1-0003, FDO, (8-23-99).

- According to the Department of Commerce, Trade and Economic Development (CTED), the minimum guidelines for classifying agricultural lands provide that:

  (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

  (a) The availability of public facilities;
  (b) Tax status;
  (c) The availability of public services;
  (d) Relationship or proximity to urban growth areas;
  (e) Predominant parcel size;
  (f) Land use settlement patterns and their compatibility with agricultural practices;
  (g) Intensity of nearby land uses;
  (h) History of land development permits issued nearby;
  (i) Land values under alternative uses; and
  (j) Proximity of markets.

  (2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to department of community development.

  (3) Counties and cities may further classify additional agricultural lands of local importance. Classifying additional agricultural lands of local importance should include consultation with the board of the local conservation district and the local agricultural stabilization and conservation service committee. … WAC 365-190-050.

  These GMA definitions and CTED guidelines create a standard for analyzing, classifying and designating agricultural lands of long-term commercial significance but do not compel any particular outcome or result. 99-1-0018; Grant *County Association of Realtors v. Grant County;* Final Decision and Order; (May 23, 2000).

- That relatively poor soil properties of those lands and their current fallow state should prevent their classification as "agricultural" resource lands is incorrect and short sighted. If

Respondent took no action to protect lands that could be benefited by a continuation of the Columbia Basin Project, there may not be sufficient suitable land left to efficiently and economically irrigate when Congress determines it is ready to finish what it started. As technology improves, the soils that are marginal today may become more than sufficient to support the crops of tomorrow. Respondent should be commended for its conservationist approach to the most economically important resource lands in its jurisdiction. 99-1-0018: *Grant County Association of Realtors v. Grant County;* Final Decision and Order; (May 23, 2000).

- The County has considerable discretion in carrying out its duties under the GMA. So long as a local governing body is not exploiting this discretion to a level that becomes "clearly erroneous," we will defer to the wisdom and judgment of the local decision-making process. When it comes to implementing the CTED guidelines in reference to soil class and quality, we have approved local classifications of agricultural land when they err more toward the side of inclusion of lands, rather than exclusion. Respondent's actions meet this standard, taking the CTED guidelines as direction to consider including "at least" lands with prime and unique soils, not "at most" those lands. See WAC 365-190-050(3) allowing a county to classify "additional lands of local importance" beyond those classified after consideration of the factors specified in subsections (1) and (2), which include consideration of the Soil Conservation Service's published soil analysis). 99-1-0018; Grant *County Association of Realtors v. Grant County;* Final Decision and Order; (May 23, 2000).

- There is no requirement that the minimum lot size in agriculture resource lands be the average size of farms existing there. The establishing of a 40-acre lot size minimum is not unreasonable and is an appropriate lot size in the County's effort to protect the farmland from loss or damage. 99-1-0016: *City of Moses Lake v. Grant County;* Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000)

Airport

- The Growth Management Act (GMA) provides for the siting and protection of airports in the following statutes:
  RCW 36.70A.510 General aviation airports, adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 3.70.547.

  RCW 36.70.547 General aviation airport – Siting of incompatible uses states as follows:

  > Every county, city, and town in which there is located a general aviation airport that is operated for the benefit of the general public, whether publicly owned or privately owned public use, shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Such plans and regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment. Each county, city, and town may obtain technical

> assistance from the aviation division of the department of transportation to develop plans and regulations consistent with this section.
>
> Any additions or amendments to comprehensive plans or development regulations required by this section may be adopted during the normal course of land-use proceedings.
>
> This section applies to every county, city, and town, whether operating under chapter 35.63, 35A.63, 36.70, [or] 36.70A RCW, or under a charter. [1996 c 239 sec. 2.]

Son Vida II, a Washington limited Partnership v. Kittitas County, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The densities of uses permitted under the Airport Overlay Zone are appropriate when placed in the context of location of the airport, the Countywide Planning Policies and the small percentage of the UGA that is impacted. . *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The County is required to consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation.
  The siting of high-density residential development adjacent to the airport has been recognized by the hearings boards as inappropriate and incompatible. In Abenroth *v. Skagit Co,* #97-2-0060c (Final Decision and Order, January 23, 1998) the Western Board ruled that the large size of the Bayview UGA was unjustified because there was not a showing for such a large unincorporated residential UGA. *Son Vida II, a Washington limited Partnership v. Kittitas County,* EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The GMA was amended in 1996 to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. RCW 36.70A.510 provides:
  "Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting general aviation airports are subject to RCW 36.70.547." *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- Washington State Department of Transportation ("WSDOT") - Aviation Division was established under the GMA as an integral part of the land use planning process. RCW 36.70A.510 was enacted to address the exact course of conduct exercised in this case. WSDOT Aviation Division noted the historic planning problems associated with general aviation airports. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision,(December 5, 2002).

- The statutory directive is clear and unambiguous: (1) the local jurisdiction must engage in formal consultation with airport owners and managers, and WSDOT Aviation Division prior to adoption of comprehensive plan amendments; and (2) file proposed plans with WSDOT Aviation Division within a reasonable time after release for public comment. The City of Yakima failed to meet either of the mandated requirements. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The purpose of technical assistance is to inform and guide the decision maker in consideration, review and determinations regarding adoption or amendments to comprehensive plans and development regulations. In this case, the decision makers had no information, input or assistance prior to the adoption of Ordinance No. 2001-56. An after-the-fact process is not an appropriate substitute for the clear directions established by Growth Management Act. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

Allocation of Population

- As discussed in Issue No. 11, the BOCC revised the population allocation between the City and the County's comprehensive plan on the date it adopted the plan. While the analysis in the County's Capital Facilities Plan is based on the original population allocation for the County UGA of 53,370, the County has shown it has adequate service capacity for the additional population. Unless the City can demonstrate the County action is clearly erroneous, the action of the County is presumed valid.
  RCW 36.70A.070(3)(d) states in part: "that counties and cities provide "at least a six-year plan that will finance [planned for] capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

Amendment

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County,* EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific plan and regulation changes. The City's requirement that limits the public's suggestions to general goals and policies is too restrictive. A process for receiving both specific and general suggestions is necessary. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003)

- Spokane County argues that the 21 textual amendments and 51 land use map amendments were not "substantial," and therefore the County is exempted from holding further public hearings on the amendments.

  The Board declines to accept this argument. First, RCW 36.70A.035(2) does not require that the amendments be significant. RCW 36.70A.035(2)(b)(iii) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect."

  Second, all of the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Comprehensive Plan in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). For example, many of the textual amendments change "shall" to "should" and "require" to "encourage." This changes mandatory policies to discretionary policies. In some cases, policies were deleted altogether.

  The Board reaches a similar conclusion with respect to the 51 challenged amendments to the land use map. As Petitioners point out, just four of these map amendments re-designate over 1600 acres from the recommended Comprehensive Plan. The County asserts that the acreage involved is minimal when compared to the 1,128,832 acres within Spokane County and is therefore not a substantial change.

  We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become

part of the final comprehensive plan. There was nothing in either the notices for the three public hearings, or in the text of the Planning Commissions recommended Comprehensive Plan that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for consideration. Nor was there any notice that the county had received letters requesting comprehensive plan changes and inviting the public to review the letters and comment on the changes being considered. We therefore find that the 72 challenged amendments were not among the scope of alternatives available for public comment. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- Taken together, these three statutes clearly demonstrate the legislature intended that public participation be a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p. 6 of 16 (May 21, 1999). This means, at a minimum, that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- As we held in *1000 Friends and Neighborhood Alliance of Spokane, v. Spokane County, supra*, "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- We therefore find that the changes at issue in this case were "amendments" to the Comprehensive Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- Based on the record before it, the Board finds the change resulting from the entry of the agreed order stipulated to by the County and a party is a permanent amendment to the County's comprehensive plan and as such may be reviewed by the Board upon the filing of a petition at any time but no later than 60 days after publication by the County of such action. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Motion to Vacate Dismissal of Petition for Review (Jun. 24, 1997).

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the FUGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

Annexation

- The Board recognizes it may be more expensive to provide urban services to 1-acre densities but it is not a hindrance for annexation. While it may be more expensive for the homeowner, it should not be more expensive for the City or County. One-acre lots in cities and Urban Growth Areas are not prohibited by the GMA. The County has discretion when establishing densities, as long as the Goals of the GMA are not frustrated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

Appeal to Court

- The Act indicates that compliance-hearing findings should not be treated as final. While the final decision and order of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a final decision and order. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 until an ordinance complies is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

Best Available Science (BAS)

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers

and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- The Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure that the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional.

  Title 13.20.020 provides: "The applicant, Planning Department, agencies with expertise and often times, a qualified professional may (emphasis added) be involved in the mitigation process." This provision is inadequate. Mitigation, to ensure protection, must be determined by a qualified professional.

  The Board finds that if a qualified professional were to determine the mitigation requirements when mitigation is called for, Petitioners would have failed to carry their burden on the other mitigation arguments. Ratios for replacement, enhancement, etc., if determined by a professional, can be expected to protect the critical area. Likewise, before a "reasonable use" exception is granted, a professional determination of any mitigation measures required ensures the protections necessary.

  The Board recognizes off-site mitigation compensation sometimes is necessary and appropriate if the functions and values of the affected critical area are maintained or enhanced. However, this determination also can be made only by a qualified professional. Petitioners have failed to carry their burden of proof with the exception of their argument for use of a qualified professional. By failing to require the use of a qualified professional in determining mitigation measures, Title 13 fails to protect critical areas, and is clearly erroneous. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd*., 96 Wn. App. 522, 532, 979 P.2d 864 (1999). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. “While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams.” (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik’s recommendations with a minor exception of dropping the “+” sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik’s conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, “I can live with that”, after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN*, *supra*, at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Stevens County’s contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would

degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- No science is found in the record that supports any construction within buffers or setbacks. The science clearly mandates that any development activity which occurs within a buffer must either be prohibited or mitigated, regardless of where neighboring structures are located (common-line setback provisions) or whether it involves expansion or replacement of an existing structure. The record does not support these provisions within Title 13 that allow development activity in critical areas without ensuring adequate protection for the affected area. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is <u>generally</u> one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes includes an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional. Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified

professional fail to protect critical areas and are clearly erroneous. . *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.
  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via bas as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.
  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- Regarding the adequacy of the development regulations to implement the listed goals of the comprehensive plan, the Board has a major concern: the development regulations must utilize best available science in protecting critical areas. Nothing in the record indicates best available science was included in these regulations. In fact, what evidence exists suggests that best available science has been rejected. RCW 36.70A.172 is specific. Best available

science must be utilized in protecting critical areas. Ordinance 2001-09 is flawed by not "including the best available science in developing policies and development regulations to protect the functions and values of critical areas". (RCW 36.70A.172). We need not address each specific goal challenged by the Petitioners. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County,* EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County & David Robinson, v. Ferry County,* EWGMHB, 02-1-0013, Final Decision and Order, (December 23, 2002).

- We hold that the requirement that counties and cities use the best available science is a requirement of inclusion of BAS in a substantive way in both the designation and protection of critical areas. Counties and cities must analyze the scientific evidence and other factors in a reasoned process. They must take into account the practical and economic application of the scientific evidence to determine if it is the "best available." *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Final Decision and Order (Apr. 10, 1997).

- The County does not have to specifically refer to the Department of Ecology (DOE) "Washington State Wetlands Identification and Delineation Manual," Ecology Pub. #96-94, in its Comprehensive Plan to be in compliance with the requirement to consider and include the BAS. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

- The County has not provided sufficient evidence that BAS was considered or included in its designation of priority species or habitat areas for priority species. The County provides no rationale for excluding species designated by DFW. The Board finds that Petitioners have met their burden of proof that Ferry County acted erroneously in the designation of priority species and habitat areas *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

- The Board finds the language chosen by the County does not in itself violate the legal requirement to include best available science in protecting wetlands. The Petitioners have not met their burden of proof. Clarification of the County's intent can be made in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

- It is the County's obligation to include best available science in the designation and protection of frequently flooded areas. Ferry County, by its failure to demonstrate otherwise, forces this Board to conclude that best available science was not included in developing policies in the sections of the SCAP under review. The contention that the silence of the reviewing Department is considered approval and constitutes consideration and inclusion of best available science is not correct. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order Denying Motion for Reconsideration, (11-24-99).

- This Board recognizes that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the Administrator in charge of the variances allowed under the law. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

- The Board is not persuaded by the argument that the silence of a state department reviewing the Plan is approval, or the submission of a Plan for review constitutes consideration and inclusion of best available science in a plan's development. *Concerned Friends of Ferry County, v. Ferry County*, **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Motion for Reconsideration, (11-24-99).

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision is based on a sound, reasoned process that includes best available science. The County consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. 97-1-0018: *Concerned Friends of Ferry County v. Ferry County;* Second Order on Compliance; (May 23, 2000).

- The Board recognizes financial limitations in Ferry County preclude the option of hiring consultants for scientific review. With this in mind, the Board recommended that Ferry County "consult with" appropriate experts within governmental agencies. Contrary to the contentions of Ferry County, the Board does not believe the County followed this advice. The County has provided no evidence in the record of any scientific review of the issues in this case. Even the one response received does not imply a scientific review. The Board does not accept "no comment" by state agencies as compliance with RCW 36.70A.172. The Board's recommendation was to consult with appropriate agencies to utilize their expertise. Simply mailing a proposed section of the comprehensive plan, without discussion or collaboration, without substantive response, is not compliance with either our order or with RCW 36.70A.172. The process must be collaborative, with the result being either incorporation of BAS recommendations in the final document, or a justification for not

including those recommendations. 97-1-0018: *Concerned Friends of Ferry County v. Ferry County;* Third Order On Compliance; January 26, 2001.

- RCW 36.70A.172(1) requires a jurisdiction enacting or re-enacting its critical areas ordinance and related development regulations to utilize "Best Available Science."

  In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

  99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001).

- The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record:

  > Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, if first in the province of the city of county to decide. Then, if challenged, it is for the Growth Management Hearings Board to review. The Legislature has given great deference to the substantive outcome of that balancing process. We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.

Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd., 96 Wn.App. 522 at 532, 979 P.2d 864 at 870, (Wash.App. Div 1, 1999).

99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001)

- A local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard.

  > The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make.
  >
  > Id., 96 Wn.App. at 534, 979 P.2d at 871 (footnotes deleted).

  99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001)

- The BAS guidelines adopted by CTED at WAC 365-195-900 through 365-195-925 are intended to describe a process for utilization of scientific information in decision-making and to ease the burden on local governments by directing them to authoritative resources that have been certified by the agencies as meeting the BAS standard.

(2) Counties and cities may use information that local, state or federal natural resource agencies have determined represents the best available science consistent with criteria set out in WAC 365-195-900 through 365-195-925. The department will make available a list of resources that state agencies have identified as meeting the criteria for best available science pursuant to this chapter. Such information should be reviewed for local applicability.

(3) The responsibility for including the best available science in the development and implementation of critical areas policies or regulations rests with the legislative authority of the county or city. However, when feasible, counties and cities should consult with a qualified scientific expert or team of qualified scientific experts to identify scientific information, determine the best available science, and assess its applicability to the relevant critical areas. The scientific expert or experts may rely on their professional judgment based on experience and training, but they should use the criteria set out in WAC 365-195-900 through 365-195-925 and any technical guidance provided by the department. Use of these criteria, also should guide counties and cities that lack the assistance of a qualified expert or experts, but these criteria are not intended to be a substitute for an assessment and recommendation by a qualified scientific expert or team of experts. WAC 365-195-915.

99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001)

- In regard to BAS, the City of Richland is correct that it can either independently develop expertise or rely on expertise of local, state, and federal agencies, but the process utilized by Richland failed to fully implement the BAS requirement. A process that is limited to "review and comment" by state agencies of existing ordinances is not sufficient to meet the spirit and intent of the CTED guidelines or RCW 36.70A.172. If a local jurisdiction chooses to follow the agency assistance path, without independently developing its own science, actual discussions and collaboration must occur. It is not permissible to assume that agency silence is acquiescence and eliminates any further requirement that the science actually used be documented in the record and substantively used to guide the decision.

  The Board specifically notes that a local jurisdiction is not required to follow without modification the recommendations or science of State agencies. When a local jurisdiction chooses to vary from recognized BAS, however, the science relied upon by the jurisdiction must be part of a reasoned process developed in the record providing the scientific support for the decision actually made. 99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001)

- The Board finds that the "Best Available Science" standard must be applied even to the process of re-evaluating and re-adopting existing ordinances to consider current science and to determine that the ordinances continue to reflect science that is the "best available." 99-1-0005: Saddle Mountain Minerals, et al v. City of Richland; Order Finding Partial Compliance; (Apr. 18, 2001)

- The present sizing of buffers may or may not be appropriate. The County did not follow the recommendations of the State of Washington. However the record does not reflect other science supporting the different sizes. RCW 36.70A.172 requires the use of the best available science in the designation and protection of critical areas. There is no record this

was done. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Final Decision and Order, July 13, 2001.

Boards

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW 36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County*, EWGMHB 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the Boards. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Motions for Reconsideration Clarification (May 27, 1997).

- The Board has recognized, in this case, that conditions unique to Ferry County must be reflected in our standard of review. Ferry County, while having a land area approximately the same size as King County or Whitman County, has a local property tax base of only 0.2% of King County and 21% of Whitman County. Ferry County's entire road department budget is less than $250,000. Clearly, Ferry County is constrained by financial circumstances in how it can reasonably respond to the GMA. The Board views our responsibility under the GMA to recognize local circumstances in our decisions. Counties not similarly constrained should not expect the same latitude given to Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

Buffers

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors and*

Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Stevens County's contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is generally one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes includes an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional. Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified professional fail to protect critical areas and are clearly erroneous. . *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra,* at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- No science is found in the record that supports any construction within buffers or setbacks. The science clearly mandates that any development activity which occurs within a buffer must either be prohibited or mitigated, regardless of where neighboring structures are located (common-line setback provisions) or whether it involves expansion or replacement of an existing structure. The record does not support these provisions within Title 13 that allow development activity in critical areas without ensuring adequate protection for the affected area. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.
  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via bas as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.
  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The present sizing of buffers may or may not be appropriate. The County did not follow the recommendations of the State of Washington. However the record does not reflect other science supporting the different sizes. RCW 36.70A.172 requires the use of the best available science in the designation and protection of critical areas. There is no record this

was done. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Final Decision and Order, July 13, 2001.

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a county has a range of discretion as to how exactly that level is met. To the extent a county relies on other statutes as part of its protection scheme, they should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- No one-size buffer or riparian management area fits all. However, criteria or standards must be specified for use when a site is reviewed and when an agreement is negotiated between the county and the landowner. There must also be notice to interested parties or to the State, so they might provide input on the management of the land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Compliance and Rescinding Invalidity Concerning Critical Areas (Sep. 2, 1998).

- This Board recognized that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the administrator in charge of the variances allowed under the law. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Apr. 8, 1999).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

- This Board recognized that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the Administrator in charge of the variances allowed under the law. *Save Our*

Butte, Save Our Basin Society, et. al., v. Chelan County **(Chelan County),** EWGMHB Case No. 94-1-0015, Order on Compliance, (4-8-99).

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

  The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (11-30-99).

- Many of the same problems identified for Section 500, above, exist here. The standard buffer widths are too narrow. Any adjustments to these buffers must begin from a point where all the wetlands will be protected. The individual adjustments may then be considered. The best available science was not included here in a substantive way.

  The exemptions found in subsection 5, the Administrative Variance in subsection 12 and the notice and appeal provisions have the same problems here as identified above in Section 500. However, subsection 13, the Modification Provisions for Existing Lots, does not have the same defect found in the Fish and Wildlife ordinance, Section 500. This section limits the eligible lots to those existing prior to the passage of this ordinance. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Order on Compliance, (4-8-99).

- WAC 365-195-805(1) states:

  "…In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc. "

  The words "setback" and "Buffer" may be used in different situations.

  The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County;* Final Decision and Order; (Jul. 6, 2000)

Burden of Proof

- The Board might not necessarily agree with the result the County reached when it designated the SRP site as Low Density Residential, yet the Board must presume the validity of the County's actions. The legislature has made it increasingly clear that the County should be given more deference in making GMA decisions. The decision-making in this case is the responsibility of the County, and the Board's function is to ensure that the County follows the law. The Board now finds the County did in-fact uniformly apply their criteria and shown their work. The Board is satisfied the Respondent has adequately analyzed the other

mining sites in Spokane County and has treated them consistently with the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County, EWGMHB*, 02-1-0003, Final Order on Compliance, (April 14, 2003).

- While the GMA requires the County to designate and conserve mineral resource lands, the Petitioner has the burden of demonstrating that any action taken by the County is not in compliance with the Act. The Board is required to find compliance with the Act, unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. *Spokane Rock Products, Inc. v. Spokane County, EWGMHB*, 02-1-0003, Final Order on Compliance, (April 14, 2003).

- In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends the boards to apply more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals or this chapter, and implementing a county's or city's future rests with that community. [1997 c 429 sec. 2.] *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The legislature was very clear that each county was to be given a broad range of discretion when planning for growth and the boards are to grant deference to both the counties and cities in how they plan for that growth. The Respondent has shown that they had input from the state, public, and airport authorities. Kittitas County and the City of Ellensburg in designating urban growth areas and develop regulations may not have satisfied all citizens in their jurisdiction, but the legislature in its finding was clear when they said the Boards must give cities and counties great deference. RCW36.70A.320 in part states: "The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous." *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.,* EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County,* EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order Denying Motion for Reconsideration, (11-24-99).

- The County's choices regarding the manner in which they have designed the Comprehensive Plan (CP) is presumed to be correct, even if someone else believes it would have an effect different than stated. 99-1-0016; *City of Moses Lake v. Grant County*; Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000).

- The County adopted interim Ordinance 2001-49-CC in their process to insure compliance with the orders and directives of this Board. A local jurisdiction's legislative action to achieve compliance with a remand is presumed valid upon adoption and the burden is on the petitioner to prove that such action is not in compliance with the requirements of the GMA. RCW 36.70A.320; Hapsmith v. City of Auburn, CPSGMHB Case No. 95-3-007c, February 13, 1997 (FNC and Notice of Second Compliance Hearing). In challenging any GMA-related actions by a county, where the county is not subject to a determination of invalidity, the petitioner bears the burden to demonstrate noncompliance. RCW 36.70A.320(2). Here, Grant County is not subject to a determination of invalidity. The County adopted the subject interim zoning ordinance pursuant to the Board's finding of noncompliance with the GMA. Therefore, unless Moses Lake can demonstrate that the action taken by Grant County is "clearly erroneous," the Board must find compliance.

RCW 36.70A.320(3). *City of Moses Lake v. Grant County*, EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

- In applying the "clearly erroneous" standard of review, this Board has recognized that it is much more deferential and creates a "greater burden of proof" than would a mere "preponderance of the evidence" standard. See Knapp v. Spokane County, EWGMHB Case No. 97-1-0015c, August 23, 1999 (Order on 4th Compliance Hearing), 1999 WL 700974, at *2. Given this substantial deference, the Board can only rule against a county when it is "left with the firm and definite conviction that a mistake has been made." See Dept. of Ecology v. PUD 1, 121 Wn. 2d 179, 201, 849 P.2d 646 (1993), as cited in Screen v. Kitsap County, WWGMHB Case No. 99-3-00012, October 11, 1999 (Order on Compliance), 1999 WL 824555, at *5. Additionally, the Eastern Board views its responsibility under the GMA to recognize local circumstances, reflecting conditions unique to a county. Woodmansee, et al. v. Ferry County, EWGMHB 95-1-0010, August 22, 1997 (Second Order on Compliance). *City of Moses Lake v. Grant County*, EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

- To carry its greater burden of proof in this case, the City of Moses Lake must specifically demonstrate how Grant County's interim zoning ordinance failed to comply with the GMA. Mere conclusory statements in a petition or Prehearing brief are insufficient to overcome the statutory presumption of validity. See Island County Citizens' Growth Management Coalition, et al. v. Island County, WWGMHB Case No. 98-2-0023c, June 2, 1999 (Final Decision and Order), 1999 WL 396745, at *38 ("The Coalition's conclusory statement that the County's DRs do not implement the County's affordable housing policies is insufficient to meet the burden of showing that the County's actions fail to comply with the Act."). *City of Moses Lake v. Grant County*, EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

Capital Facilities Element

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Order on Motion, (May 31, 2002).

- As discussed in Issue No. 11, the BOCC revised the population allocation between the City and the County's comprehensive plan on the date it adopted the plan. While the analysis in the County's Capital Facilities Plan is based on the original population allocation for the County UGA of 53,370, the County has shown it has adequate service capacity for the additional population. Unless the City can demonstrate the County action is clearly erroneous, the action of the County is presumed valid.
  RCW 36.70A.070(3)(d) states in part: "that counties and cities provide "at least a six-year plan that will finance [planned for] capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- Bremerton v. Kitsap County, CPSGMHB Case No. 95-3-0039, Order Rescinding Invalidity in Bremerton and Final Decision and Order in Alpine found the requirements for a six-year financing plan "is not an option or a priority to be balanced." The CPSGMHB, to emphasize the unequivocal intent of the GMA held, that the "six-year plan period begins with the date of the adopted Plan." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County's Capital Facilities Plan was adopted in November 2001; the included financing plan is for 2000 – 2006. Nearly two years of this financing plan had already passed upon the adoption of the Plan. There is a requirement of a 6-year Facilities Plan. The fact that an amendment can correct an error or omission does not bring the County into compliance now. The County's Capital Facilities Plan does not cover the requisite time period and is not in compliance with the GMA. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- RCW 36.70A.070(3)(d) provides, when planning for future growth and forecasting future capital facilities needs pursuant to RCW 36.70A.070(3)(b), the adequacy and availability of public facilities and services must be realistically evaluated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- Because the County has designated large County UGAs, they have an even larger responsibility to insure that services will be there when developments are occupied. In Issue No. 13, the Board remanded the Capital Facilities Plan to be redrafted to include the time period as required by the GMA. During that process, the County will be required to again address the adequacy of the Plan to service needs. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The GMA requires a county to analyze some of the capital facility planning issues relevant to special districts, but we believe this should not be construed to require a county to do the detailed planning required of the special district itself. In fact it would be a fruitless effort to plan for the special district and tell them what they will do and how the money will be raised. This would be useless duplication and normally unenforceable. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Counties must provide an inventory of existing capital facilities and forecast the future needs for such capital facilities. More than this is not needed for special districts or facilities not owned or operated by the county. We decide that RCW 36.70A.070(3)(c) be read as if the phrase "owned or operated by the city or county" existed at the end. This interpretation is required by necessary implication. To hold otherwise would require a county government as the regional planning entity within a county, to conduct capital planning for all public facilities regardless of ownership. To require this would be costly and in some cases, impossible. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

Clustering

- The Board in the case Wenatchee Valley Mall Partnership v. Douglas County, EWGMHB 96-1-0009 has recognized clustering as an acceptable technique to preserve large-tract

agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which enable agricultural production. Clustering of homes, along with relatively large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Clustering is only appropriate for lands not designated for agriculture, forest, or mineral resources. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

Community, Trade & Economic Development (CTED), Department of

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of Wildlife Habitat Injustice Prevention, et. al. v. City of Covington, CPSGMHB, 00-3-0012 (Order on Motions 11-16-00) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

  Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake, a municipal corporation, v. City of Spokane Valley, A municipal corporation,* EWGMHB, Case No. 03-1-0009, Order on Motions, March 23, 2004.

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of mediation services." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on December 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (See *Cameron Woodard Homeowners Assoc. v. Island County*, 02-2-0004, Order on Dispositive Motion, p. 2, 2002.)

In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Milo and Donna Bauder v. City of Richland, a municipal corporation*, EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

Compliance

- In compliance hearings where a determination of invalidity has not been entered, the burden of proof remains with the Petitioner. (See RCW 36.70A.320(2)). The Petitioner must convince the Board that the Respondent's efforts to comply are not in compliance with the requirements of the GMA. *Ridge v. Kittitas County et al*. EWGMHB 00-1-0017, Compliance Order, (April 10 2002).

- The Board concurs with Petitioners arguments that development regulations cannot be compliant when they implement non-compliant provisions of a Comprehensive Plan. Development regulations are to implement a Comprehensive Plan (RCW 36.70.040). In this case, the Board finds the objected-to regulations implement the noncompliant portions of the Comprehensive Plan and to that extent, they too are noncompliant. If the provisions are not compliant in the Comprehensive Plan, they are not compliant when found in corresponding provisions of the development regulations. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The provisions in the development regulations addressing the Rural Transition Zone implement the very Comprehensive Plan provisions previously found non-compliant. We find the Development Regulations implementing non-compliant Comprehensive Plan provisions to also be non-compliant. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- Unlike hearings on the merits, a compliance hearing presents no established set of issues. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- RCW 36.70A.330 does not preclude the Board from holding multiple compliance hearings. If a county, for instance, is found at a compliance hearing to be in noncompliance but takes subsequent action to come into compliance, it must have an avenue to be found in compliance. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-

1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- There is nothing in the language of RCW 36.70A.330, which suggests that the Board does not have continuing jurisdiction to determine whether a county has come into compliance at some date after an initial compliance hearing. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- When a compliance hearing results in a finding of continued noncompliance, the Board's jurisdiction is not at an end. It retains jurisdiction to determine at a later date whether compliance has been achieved and to make orders relating to the original compliance order. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- The Act indicates that compliance hearing findings should not be treated as final. While the final decision and order of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a final decision and order. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- In a compliance proceeding, petitioners are precluded from attacking specific portions of the comprehensive plan and interim development regulations, which were not raised or considered during petitioners' appeal before this Board. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 97-1-0003, Order on Compliance (May 20, 1997).

- Having been found out of compliance, the county must show it has done what is necessary to comply. *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Order on Compliance (Sep. 23, 1997).

Comprehensive Plan

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of

their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Order on Motion, (May 31, 2002).

- The Comprehensive Plan establishes the County's policy and goals for the management of growth and their compliance with the Growth Management Act. Development regulations are to be adopted to implement those policies and goals. These regulations must be consistent with the Comprehensive Plan (RCW 36.70A.040). *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Final Decision and Order, (July 29,2002).

- The balancing of various goals under the GMA occurs during development of the comprehensive plan. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs,(Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". 00-1-0001: Concerned *Friends of Ferry County v. Ferry County*; Final Decision and Order;(Jul.6, 2000).

- In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends the boards to apply more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals or this chapter, and implementing a county's or city's future rests with that community. [1997 c 429 sec. 2.] *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to

eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County*, **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County*, **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

- An interim designation is made to protect the resource. It recognizes that once resource lands are lost through inappropriate development, it is difficult, if not impossible to reverse the loss. At the comprehensive plan level, designations are reviewed and possibly modified in the light of newly developed information and the need to successfully integrate all the components of the plan. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Counties are required to designate agricultural lands that have long-term significance for the commercial production of food or other agricultural products. The requirement to adopt a comprehensive plan is in a separate section of the Act. The requirement to designate and conserve agricultural land is not an interim requirement, valid only until the local agency adopts a comprehensive plan. When the comprehensive plan is being adopted, the county is to review the designations and development regulations and insure they are consistent with the plan. The designations are separate requirements under the GMA and can be reviewed by the Board in a separate action. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order on Compliance on Agricultural Lands of Long-Term Commercial Significance Designation and Criteria (May 27, 1997).

- Because this Board has found it has the jurisdiction to review the Timber Forest Practices Ordinance's (TFPO) effect upon the County's compliance with the GMA, we must look at the County's Comprehensive Plan and how it is affected. At this time, there are gaps in the County's protection of streams and riparian areas. The County has assured us they will adopt appropriate development regulations to protect the unprotected streams and riparian areas. The fact that another ordinance, the TFPO, has included a 50-foot minimum setback in its language does not excuse the County from adopting development regulations to protect the resources as required by the GMA. The passage of the TFPO ordinance does not move them in or out of compliance. This ordinance places a buffer, although small, where none exist at this time.

We do not find the TFPO causes Ferry County's Comprehensive Plan to be out of compliance. The Plan is still the final measure of compliance and the passage of the TFPO changes nothing in the plan or in the regulations that still must be adopted. Ferry County Ordinance 99-01 (TFPO). *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion For Reconsideration, (9-29-99).

- The GMA makes no provision for an "interim Comprehensive Plan". A Comprehensive Plan adopted by a County or a City, under the GMA, is a final plan, which may be amended as provided by law. *Bert and Gayle Bargmann and Greenfield Estates Homeowners' Assn. v. City of Ephrata,* **(Greenfield v. City of Ephrata),** EWGMHB, Case No. 99-1-0008c, FDO, (12-22-99).

Concurrency

- The County must meet the GMA goal of concurrency. They must ensure at the time of new development, public facilities and services are in place or are adequately planned. The word "ensure" found in this statute imposes a requirement on local governments to state what it plans to do and how that is to be accomplished in order to achieve concurrency compliance. The requirements found in the platting ordinances for adequate facilities are not what are required by the GMA. RCW 36.70A.020(12). Because the Comprehensive plan has not been adopted, the Board sees only a portion of the County's management of growth. When the Comprehensive plan is adopted, concurrency is to be measured by the adequacy of public facilities, including parks. Something more than a generalized policy statement is necessary to comply with the GMA. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- A local government has both the duty and the right to determine the adequacy of public facilities and services. Such a determination requires the examination of current adequacy level and then a local government's future ability to add to those facilities and services. The County must establish an objective baseline to determine minimum level of services standards for public facilities and services.

  RCW 36.70A.020(12) requires local governments to adopt either policies or regulations or a combination thereof that provide reasonable assurances, but not absolute guarantees, that the locally defined public facilities and services necessary for future growth are adequate to serve that new growth, either at the time of occupancy and use or within an appropriately timed phasing of growth, connected to a clear and specific funding strategy. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Consistency

- The Respondent does not argue that a review for consistency of the development regulations with the comprehensive plan was not done at this stage. Instead, they argue the law does not require such a review. The Board disagrees. Any review done prior to enactment of the comprehensive plan would be irrelevant to development regulations passed to implement the new comprehensive plan. This review for consistency must be done, and reflected in the record. However, the County will be required to make changes to these regulations. A review at this time would not be appropriate. After the Comprehensive Plan is found in compliance and new regulations are adopted, it is expected that the County will review the

regulations and the Plan for consistency. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- While it is true the Board did not find non-compliance for failure to require notice on plats and permits issued for development activity within 500 feet of designated resource lands, we noted in that decision that RCW 36.70A.060(1) would still be a requirement of the law. The language provided in Ordinance 2001-09 is non-specific, while the language in the ICAO, as noted by the County, is in specific contradiction to the statutory 500 feet. This contradiction must be corrected to conform to the statute. The distance is 500 feet as required by the above statutory language. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another. West Seattle Defense Fund v. City of Seattle, CPSGMHB Case No. 94-3-0016, Final Decision and Order. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- This action incorporates a revised Road System Plan different than what had been in effect before. The City's contention that Ordinance 46-00 "resolved a conflict" is true to the extent that the then-existing Road System Plan for the subject area had not been previously incorporated into the Comprehensive Plan.

- Having said that, the fact that this amendment changes certain roadway plans does not in itself cause the City's Plan to be inconsistent. Many options for a road system plan could be very different, and still meet the goals of the GMA and policies of the Comprehensive Plan. Petitioners have failed to show how the option chosen is inconsistent with the Comprehensive Plan. The Petitioners have not carried their burden of proof. *Milo and Donna Bauder v. City of Richland, a municipal corporation*, EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

- Ferry County claimed that they reviewed the Interim Critical Areas Ordinance for consistency and found it consistent. The petition herein was filed before this "review" took place. Ferry County provided, at the request of the Board, minutes of the Ferry County Planning commission meetings of June 14, 2000 and July 5, 2000, which discussion items included a review of the "interim critical areas ordinance". The Respondent also supplied minutes of the Ferry County Board of Commissioners of June 19 where the issue of review of the interim critical areas ordinance was discussed. No action was taken by the County, which reflected the results of the claimed review. 00-1-0013: *Concerned Friends of Ferry County v. Ferry County;* Final Decision and Order; (Nov. 2, 2000)

  The documentation provided was insufficient to convince the Board that a review of the CAO had been preformed which meets the requirements of the Growth Management Act. There was no record provided of any discussion comparing the requirements of the comprehensive plan with the regulations of the Critical Areas Ordinance. There was no record of a public participation process in the review, as required by RCW 36.70A.140. The County needs to review the CAO with public participation. This is especially true where the County has declared to this Board that a final CAO was to be developed and adopted to address the complaints raised in other petitions before this Board. 00-1-0013: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Nov. 2, 2000)

- GMA requires that development regulations enacted by planning entities be consistent with the comprehensive plans of those entities, RCW 36.70A.040(4)(d). The zoning regulations adopted by Yakima County is not consistent with the land use designations established for the area by Plan 2015. 00-1-0009: Beatrice *M. Bertelsen, et al. v. Yakima County,* et al.; Final Decision and Order; (Nov. 2, 2000).

  Growth Management Act (GMA) also requires that development regulations "implement" the policies and provisions of the comprehensive plan. "Implement" has a more affirmative meaning than merely "consistent with." Implement connotes not only a lack of conflict but sufficient scope to carry out fully the goals, policies, standards and directions contained in the comprehensive plan. The R/ELDP zoning district does not implement Plan 2015's RSS land use designation. 00-1-0009: *Beatrice M. Bertelsen, et al. v. Yakima County, et al.*; Final Decision and Order; (Nov. 2, 2000).

- The provisions of any GMA enactment must be internally consistent. This includes the comprehensive plan and development regulations, both interim and final. RCW 36.70A.070. Internal consistency means provisions are compatible with each other and they fit together properly. In other words, one provision may not thwart another. A development regulation must be internally consistent and all development regulations must be consistent with each other. 99-1-0005; *Saddle Mountain Minerals, LLC, et al. v. City of Richland;* Order on Compliance; (Jun. 21, 2000).

- RCW 36.70A.100 provides "the comprehensive plans of each county or city that is adopted pursuant to RCW 36.70A.040 shall be **coordinated with, and consistent with**, the comprehensive plans adopted pursuant to RCW 36.70A.040 of those counties or cities with which the county or city has in part . . . common borders or related regional issues." (Emphasis provided.) The Board has jurisdiction in this matter. Clearly the issue here is non-project specific, and must be addressed prior to any project-specific action. The statute requires coordination and consistency at this early stage of planning, not just as a part of a development agreement. 00-1-0017: Ridge v. Kittitas County, et. al.; Final Decision and Order; (Jun. 7, 2001).Affirmed, Yakima County Superior Court, #00-2-02761-2.

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

Continuance

- The Growth Management Hearings Boards have only the authority the State Legislature granted it under the GMA. Where the parties do not agree to a continuance of the matter and other authority for such a continuance does not exist, a continuance beyond the 180 days is not appropriate. The matter is dismissed. *Husum Citizens Group v. Klickitat County*, EWGMHB 00-1-0004 Order of Dismissal (January 11 2002).

Coordination

- The Board sees that coordination has been occurring since our Order. The Board has no authority to order a particular result from that coordination, and is convinced that the City of Roslyn is "at the table" in matters that relate to its interests. Kittitas County has, as a condition of approval of the MPR, required ongoing coordination with Roslyn. This Board cannot and will not police this coordination. These two governments are working together and should continue to do so. *Ridge v. Kittitas County et al*. EWGMHB 00-1-0017, Compliance Order, (April 10 2002).

- Clearly, the largest city in Eastern Washington should be an active participant in the planning for services in urban areas that abut its city limits. In fact, it is the County's failure to coordinate their planning with the City of Spokane that contributed to the findings of noncompliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of mediation services." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- RCW 36.70A.110(2) clearly states the Legislature's intent is that the City and County attempt to reach agreement. More effort was required than the County provided. While agreement is not mandatory, an attempt to agree is necessary. The Board finds the County's failure to enter into discussions with the City on the elimination of the City's UGA outside the City is clearly erroneous. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The importance of coordination is first found in the legislative finding at the beginning of the GMA:

> The Legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and health, safety and high quality of life enjoyed by residents of that state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning…

RCW 36.70A.010.

> The Supreme Court quoted these findings and explained that they:
>
> Reflect a legislative awareness that land is scarce, land use decisions are largely permanent, and particularly in urban areas, land use decisions affect not only the individual property owner or developer, but also entire communities.

Erickson & Assoc. v. McLerran, 123 Wn.2d 864, 876 (1994). 00-1-0017: Ridge v. Kittitas County, et. al.; Final Decision and Order; (Jun. 7, 2001). Affirmed, Yakima County Superior Court, #00-2-02761-2, May 29,2001.

County-wide Planning Policies (CPPs)

- The Board finds City of Airway Heights acted unilaterally to pre-empt a joint planning process required by the Countywide Planning Policies. The GMA requires coordination among affected jurisdictions. Airway Heights has clearly erred by circumventing the CPP. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- The Board concurs with Petitioner and Intervenor that the action is significant and is subject to the Growth Management Act, and therefore, the Countywide Planning Policies. Ordinance C-517 is an amendment to the City's Comprehensive plan and clearly must comply with the GMA. The City's attempt to explain the action under statutes authorizing annexations does not justify circumventing the GMA mandated process.

  The Washington State Supreme Court ruled in *King County v. CPSGMHB*, 138 Wn.2d, 161, 175 (1999), that Countywide planning policies are mandatory, stating in part, "If the CPP's served merely as a non-binding guide, municipalities would be at liberty to reject CPP provisions and the CPP's could not ensure consistency between local comprehensive plans." *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- Substantive CPPs are binding on the county if they are directive also meet the following three criteria: 1. A policy must meet a legitimate regional objective, 2. It may not usurp a city's land use powers, and 3. It must be consistent with other relevant provisions in the GMA. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The City contends the County violated CPP 12.1, which requires that new land use designations be "cooperatively determined". Again, as referred to above, directive CPPs can be binding. Here, the County and City are directed to cooperate in the creation of new land use designations. Cooperation, while commendable, does not require mutual agreement on each issue. Here, where the County must make the final decisions, cooperation can mean discussion and disagreement and the County proceeding, as they deem appropriate. If the CPPs were drafted to require agreement of both parties prior to the adoption of a new land use designation, they could be directive and possibly binding. Here the County is not out of compliance. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- With regards to the siting of essential public facilities, the Board finds no provision in the law that would require the County to follow the Steering Committee's recommendation, regardless of what the CWPPs state. The CWPPs are to be followed by the County, but only to the extent allowable under existing law. The County cannot delegate its statutory

responsibility to the Steering Committee. Therefore, its actions, retaining final authority for decision-making could not be found by this Board to be out of Compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The Act requires the adoption of a framework agreement between the cities and the County for the adoption of a countywide planning policy. *City of Ellensburg v. Kittitas County*, EWGMHB 95-1-0003, Final Decision and Order (Aug. 22, 1995).

- Cities and the county are required to have a framework agreement for the adoption of countywide planning policies. They are free, however, to determine and negotiate the content of this agreement. It may or may not include a ratification provision, but once an agreement is adopted, the development and adoption of the countywide planning policy must be consistent with the agreement. *City of Ellensburg v. Kittitas County*, EWGMHB 95-1-0003, Final Decision and Order (Aug. 22, 1995).

- Only those CPPs that are directive are mandatory. There is no question the language found in CPP 2B 1-D was directive. That CPP states as follows: "Urban densities are prohibited outside of established urban growth areas except for the establishment of master planned resorts and new fully contained communities consistent with the requirements for reserving a portion of the twenty (20) year county population projection." It could not be said any clearer. 99-1-0019; *James A. Whitaker v. Grant County;* Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; City *of Moses Lake v. Grant County*; Final Decision and Order; (May 23, 2000).

- The fact that Policy 14 of the CPPs, adopted as the preamble to the CPPs, states that it is understood the policies are meant as "general framework guidelines" for the county and each municipality and that flexibility must be maintained in order to adapt to different needs and conditions, does not change the mandatory nature of a directive CPP. The King County Court, supra, made it clear the CPPs do not serve as nonbinding guides. "If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs would not ensure consistency between local comprehensive plans. The Board was therefore correct to conclude that the CPPs are binding on the County." P.175. 99-1-0019; *James A. Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000) ; 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000)

  The CPPs need not list every possible way to locate urban densities outside UGAs in order to prohibit it. 99-1-0019; James A. *Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; City *of Moses Lake v. Grant County*; Final Decision and Order; (May 23, 2000). (Upheld by Thurston County Superior Court, #00-2-01622-8.

- The Board finds that the GMA establishes the Countywide Planning Policies ("CPPs") as the mechanism for achieving consistencies between the comprehensive plans of a county and the cities within that county. RCW 36.70A.210(1) provides a CPP "shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100." The Board has already ruled that the MPR Policies are consistent with the CPPs. *City of Ellensburg v. Kittitas County*, EWGMHB No. 96-1-0017. The Board is not asked whether the MountainStar Subarea Plan is consistent with the CPPs, but with the City of Roslyn. We find

that if the MountainStar Subarea Plan is consistent with the CPPs, it is inherently consistent with the comprehensive plan for the City of Roslyn. No one has challenged the consistency of the Roslyn Comprehensive Plan with the CPPs.

- Comprehensive plans must be consistent with countywide planning policies. E.g., King County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 161, 979 P.2d 1374 (1999). However, countywide planning policies are not mandatory or binding on development regulations. E.g., City of Snoqualmie v. King County, CPSGMHB Case No. 92-3-0004c, Final Decision and Order, pp. 16-17 (1992). Thus, development regulations are not required to be consistent with countywide planning policies. E.g., The Children's Alliance and Low Income Housing Institute v. City of Bellevue, CPSGMHB Case No. 95-3-0011, Order, p. 7, 12 (May 17, 1995). The subject interim zoning ordinance is a development regulation. As such, it need only be consistent with the Comprehensive Plan, not the countywide planning policies. *City of Moses Lake v. Grant County*, EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

Critical Areas

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra,* at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Petitioners contend Stevens County assumes no responsibility for protection of CARAs. While the methodology for identifying CARAs recommended by the Department of Ecology is in the Ordinance, there is no assurance they or the protections will be used. There is not an adequate "trigger" bringing these provisions into play.

The Board finds the County has erred in exempting existing and ongoing agricultural activities from the provisions of Title 13. Certain unregulated agricultural activities can have a devastating impact on critical areas, including CARAs. To exempt all existing and ongoing agricultural operations from regulation is clearly an error.

The Board further finds the Petitioners have carried their burden of proof in showing the County failed, through Title 13, to adopt an appropriate trigger for when the methodology for identifying CARAs and the protective regulations will be used. Title 13 must include adequate provisions for initiating a review for the presence of a CARA before a development permit is issued. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County,* EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Further, laws can be so vague that they simply are unenforceable. That is the case here. Such an ordinance cannot satisfy GMA's duty to adopt enforceable "development regulations" to "protect" critical areas. A person should be able to determine what the law is by reading the published code. Ordinance no. 109-2003 (ICAO) relies on language too vague to create an enforceable standard and therefore cannot not operate to "control" land use activities and does not satisfy the county's GMA obligation to adopt "development regulations" to protect critical areas. The enforcement measures adopted by the county provide only for ad hoc enforcement. This does not constitute a reasoned adaptive management program, particularly where, as here, there is no provision for the monitoring of compliance. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or bas to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to

ensure that the goals of management are being met. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.
  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via bas as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.
  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The county's new ICAO creates the illusion of protection by identifying a "no harm" standard. But the seemingly broad expanse of that term is undermined by the failure to define the terms and develop standards and criteria by which compliance may be measured and enforcement will be effective. The provision of the "no harm" standard is unworkable, and, ultimately, contrary to GMA requirements. L*arson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- The court of appeals, in A*nderson v. Issaquah,* 70 WN. App. 64. 851 P. 2d 744 (1993), rejected "*ad hoc* case-by-case policymaking" during design review as allowed by the city of Issaquah's design review ordinance. 70 WN. App. At 79. The court rejected the city's design review standards because they failed to contain sufficient standards or ascertainable criteria by which an applicant or the city could determine whether a given building design would pass muster under the code. *Id.* At 81. The court stated: "whenever a community adopts such standards, they can and must be drafted to give clear guidance to all parties concerned" and it is "unreasonable and deprivation of due process" to expect or allow a city to create standards on an ad hoc basis during project review. *Id.* At 82-83.

See also: *city of Seattle v. Crispin,* 149 WN.2d 896, 905, 71 P.3d 208 (2003), which states in relevant part:

> "however, as we recognized in *Dillingham,* the statute does not support the distinction the court of appeals draws between adjustments that are minor compared with substantial. Nor would such a rule be workable, and would perhaps be unconstitutional. We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application."

Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- RCW 36.760a.030(5) and WAC 365-195-410 defines critical areas. Fish and Wildlife Habitat Conservation Areas are considered critical areas under the act. furthermore RCW 36.70A.170(2) states:

> "In making the designations required by this section, counties and cities shall consider the guideline established pursuant to RCW 36.70a.050."

Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB 00-1-0016, EWGMHB, Third Order on Compliance, November 14, 2003.

- There is no statutory requirement for a written statement to be prepared saying how the County reviewed the critical areas and development regulations. RCW 36.70A.060(3) requires the review but does not require a specific method or manner for the review. The County is presumed to have complied with the GMA and the record reflects their claim to that effect. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County & David Robinson, v. Ferry County,* EWGMHB, 02-1-0013, Final Decision and Order, (December 23, 2002).

- WAC 365-195-805(1) states:

"…In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc. "

The words "setback" and "Buffer" may be used in different situations.

The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County;* Final Decision and Order; (Jul. 6, 2000)

- We hold that the requirement that counties and cities use the best available science is a requirement of inclusion of BAS in a substantive way in both the designation and protection of critical areas. Counties and cities must analyze the scientific evidence and other factors in a reasoned process. They must take into account the practical and economic application of the scientific evidence to determine if it is the "best available." *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Final Decision and Order (Apr. 10, 1997).

- The County does not have to specifically refer to the Department of Ecology (DOE) "Washington State Wetlands Identification and Delineation Manual," Ecology Pub. #96-94, in its Comprehensive Plan to be in compliance with the requirement to consider and include the BAS. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- Relying on unnamed regulations to enforce the protection of critical areas is inadequate. Also, the use of the standard "minimize impact" is inadequate. There must be a specific, objective standard for review in the ordinance that will protect with reasonable certainty. The required standard of protection should be to "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned

by the Act. Counties' critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- Whether by use of mapping or through performance standards, the requirement of RCW 36.70A.170 is to provide sufficient specificity to adequately identify designated critical areas. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- If a county or city chooses to rely on other ordinances, maps or inventories to designate critical areas, as it may well do, it should reference the items upon which it relies in its resolution. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Under RCW 36.70A.060(2), each county "shall adopt development regulations that protect critical areas," including fish and wildlife habitat conservation areas. The standard of protection previously enunciated by this Board is "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." RCW 36.70A.020(9) concerns conservation of fish and wildlife habitat areas and for the purpose of this issue parallels RCW 36.70A.060(2). *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- All counties, whether planning or non-planning, must designate agricultural resource lands and critical areas. All counties must protect critical areas. These designations and protections provide the basis for further planning. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- Designation of critical areas establishes the general distribution, location, and extent of critical areas. Land use designations must provide landowners and public service providers with the information necessary to make decisions. Their purpose is to identify the appropriate areas so that interested parties know where they are; the effectiveness and fairness of this process is dependent upon a user's ability to identify the designated critical areas. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- A local government's attempt to consolidate and streamline its critical area designation and protection requirements of these acts, the GMA, the Shoreline Management Act, and the Flood Plain Management Act is desirable and fully consistent with the goals of the GMA. Regulatory process consolidation, however, cannot come at the expense of the substantive requirements of the laws being consolidated. In other words, successful integration demands compliance with the laws that govern each subject area being integrated. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to

show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). A county should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- Critical area designations as well as resource land designations are an important first step in the planning process. They provide the sideboards for further comprehensive plan development by pointing out either where development should not occur or where, at the least, there are significant developmental concerns. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- High quality and/or particularly vulnerable wetlands require greater protection that lowers quality or less vulnerable wetlands. In order to provide the minimum level of protection for high quality wetlands, one of two approaches is necessary. Either all wetlands must be protected at a level necessary to protect wetlands requiring the greatest level of protection or a rating system can be used to differentiate wetlands of various quality levels and then protections can be accorded in relation to the need of each particular quality level. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a County has a range of discretion as to how exactly that level is met. To the extent a County relies on other statutes as part of its protection scheme, they should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- Counties may use the National Wetlands Inventory as an information source for determining the approximate distribution and extent of wetlands. Counties should consider using the methodology in the Federal Manual for identifying and delineating jurisdiction wetlands, cooperatively produced by the U.S. Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Soil Conservation Service and the United States Fish and Wildlife Service, that was issued in 1989, and Regulatory Guidance Letter 90-7 issued by the United States Corps of Engineers on November 29, 1990 for regulatory delineations. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- Designation of critical areas means, at least, formal adoption of a policy statement and may include further legislative action. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- Performance standards are acceptable as a method to identify unknown critical areas. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- The GMA defines critical areas and requires the gathering of empirical facts to determine where and what type of critical areas is present with regard to specific parcels of land. However, the GMA does not require a specific method of gathering data for purposes of inventorying, designating or regulating critical areas. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The standard for designating critical areas and forestlands is "land use designations must provide landowners and public service providers with the information needed to make decisions." Given the recognized deficiency in the maps in this case, it is necessary to follow up that designation with a process, which includes on-site inspections as permits are processed. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Order on Compliance (Apr. 16, 1997).

- RCW 36.70A.060(2) requires that all lands designated under RCW 36.70A.170 be protected and lacks any qualifying language to suggest that regulated critical areas are a sub-set of all critical areas. All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree. *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Final Decision and Order (Apr. 10, 1997).

- The GMA directs counties to designate, classify and protect areas with a "critical recharging effect on aquifers used for potable water." It is necessary to determine the location of recharge areas as a first step in designating and protecting them. The county must provide criteria necessary to indicate when an area needs specific scientific analysis to determine whether it is a critical aquifer recharge area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Apr. 8, 1999).

- In Ferry County's unique circumstances, where adequate, accurate maps are not available, an on-site inspection at the time of permit application, coupled with existing maps and well-defined standards, meets the requirements of the GMA for designation of critical areas in Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

- The Act requires protection of critical areas, and the county is given the opportunity to select the manner of that protection. Their choice is given great deference. *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Order on Compliance (Sep. 23, 1997).

- RCW 36.70A.020 and Board decisions do not preclude all development in critical areas. The GMA and Board decisions do, however, require that critical areas be protected. As long as critical areas are protected, other non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- This Board recognizes the County may provide for individual review of specific parcels of land for appropriate changes to the standard buffers. However, we found in our previous order that standards or criteria must be listed to ensure the protection of these critical areas required by the GMA. (FDO September 1998). Subsection 11.3 lists these criteria, but only directs the Administrator to "consider" them. Also, 11.3(A) provide that the measures be "adequate to avoid significant degradation to the fish or wildlife habitat area." There is no definition of "significant." There should be no degradation of the habitat area. The criteria should be mandatory. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

- If the designation of the IUGA appears to include as buildable, lots near or part of Critical Areas, those potential encroachments upon Critical Areas would be subject to the protections and limitations already approved which protect such Areas. Such claimed inconsistency cannot now be said to modify the Critical Areas protections. *Kenneth and Sandra Knapp et. al., v. Spokane County*, (**Spokane County**), EWGMHB Case No. 97-1-0015c, Order on Motion for Reconsideration, (9-30-99).

- RCW 36.70A.020 and Board decisions do not preclude all development in critical areas. The GMA and Board decisions do, however, require that critical areas be protected. As long as critical areas are protected, "other, non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements." *Assn. To Protect Anderson Creek, et al. v. Bremerton et al*. CPSGMHB Case No. 95-3-0053 (12-26-95).

- The County has shown their work and review of this work demonstrates that there are methods to maximize the development of lands within the City limits of Spokane while still protecting critical areas. While the Petitioners contend these methods will not generate sufficient area for the population allocated, they have not carried their burden of showing the choices made by the County are clearly erroneous. *Kenneth and Sandra Knapp et. al., v. Spokane County*, (**Spokane County**), EWGMHB Case No. 97-1-0015c, Order on Motion for Reconsider, (9-30-99).

- RCW 36.70A.170(1)(d) requires, "where appropriate" to designate critical areas. Critical areas include "areas with a critical recharging effect on aquifers used for potable water." RCW 36.70A.030(5). The County must designate these critical areas and protect them from degradation. 99-1-0016; *City of Moses Lake v. Grant County;* Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000)

- The purpose of the Comprehensive Plan is to provide policies and direction for the critical areas ordinance. The language needs to be internally consistent with other provisions in the Comprehensive Plan and provide the foundation for consistent development regulations. In the absence of a scientific foundation, evidence of analysis, or a reasoned process to justify its rejection, the language recommended by the Dept. of Fish and Wildlife must be included. 97-1-0018: *Concerned Friends of Ferry County v. Ferry County*; Second Order on Compliance; (May 23, 2000).

- RCW 36.70A.170 requires the County to designate critical areas. This Board's decision in Save Our Butte et al v. Chelan County (EWGMHB 94-1-0015) established that the designated areas must be readily identifiable. The County's most recent actions fail on both counts. The County presents no conclusive arguments, no evidence of a reasoned process, no scientific analysis, which justify the changes. This action is clearly erroneous. : *Concerned Friends of Ferry County v. Ferry County;* Second Order on Compliance; (May 23, 2000).

- RCW 36.70A.060 states that development regulations shall "…protect critical areas that are required to be designated under RCW 36.70A.170." Ferry County contends Ordinance 72-1 and 73-1 is not the last word on protection of critical areas. The County adopted its critical areas ordinance in 1993 and that ordinance was not before this Board. These platting ordinances should not be reviewed as critical areas ordinances and will not be treated as such. The County stated they are in the process of revisiting the Critical Areas Ordinance at this time and when the County adopts amendments to that ordinance, then will be the appropriate time to hear those issues. The County cites WAC 365-190-080(5)(b)(v) which is the requirements for critical areas. Buffer zones are elements of critical areas ordinances and regulations, but not required for subdivision ordinances. The critical areas ordinance is the controlling regulation, not the more general subdivision ordinances. The County also cites WAC 365-195-825(4)(b) which states "counties and cities may add other items related to public health, safety and general welfare to the [goals of subdivisions] such as protection of critical areas, conservation of natural resource lands and affordable housing…" However, this is not required.

- WAC 365-195-805(1) states: ". In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc." The words "setback" and "Buffer" may be used in different situations. The use of "setbacks" in this case was not inappropriate. The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Jul. 6, 2000).

- A review of the ordinance readily reveals a lack of any enforcement provisions. In *Easy v. Spokane County, 96*-1-0016, the Board stated: " The absence of penalties for violations of the CAO takes the teeth out of these important regulations." Clearly, without provisions for enforcement, the Critical Areas Regulations fail to protect the values and functions of critical

areas. . *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016 Final Decision and Order, July 13, 2001.

- There is no specific method the City is required to use for the identification of these Critical Areas. The areas must be identified and mapped in such a way to allow the landowner to know where the critical areas are and what they must do. *Knapp et al v. Spokane County, et al.* EWGMHB**,** 97-1-0015c, Order on Remand, Nov. 15, 2001.

- The City of Spokane has identified the critical areas and this identification is reflected in the maps prepared by the City and provided to the Board. These maps are part of the GIS system that clearly located the critical areas and is available to the landowner. The landowner is able to locate the critical areas. The ordinances adopted by the City clearly state what needs to be done by the landowner. The ordinances go further to define "Critical Areas" and provide that if they exist and are not yet identified, how they must be designated and properly protected. *Knapp et al v. Spokane County, et al.* EWGMHB**,** 97-1-0015c, Order on Remand, Nov. 15, 2001.

Critical Aquifer Recharge Areas

- Title 13, while not designating CARAs, details a methodology for such a designation to be made. The Board recognizes that an adequate process for designation without mapping of CARAs can meet the requirements of RCW 36.70A.170. However, the Board finds nothing in the record or arguments of the Respondent to indicate when or if the adopted process will be "triggered". The Critical Areas checklist relies upon the applicant for a development permit to indicate the presence of a critical area on the subject property. There is no requirement found in Title 13 to ensure the noted "two-step" process would be used. With that missing, designation is unsure, and thus protection is unsure. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Petitioners contend Stevens County assumes no responsibility for protection of CARAs. While the methodology for identifying CARAs recommended by the Department of Ecology is in the Ordinance, there is no assurance they or the protections will be used. There is not an adequate "trigger" bringing these provisions into play.

  The Board finds the County has erred in exempting existing and ongoing agricultural activities from the provisions of Title 13. Certain unregulated agricultural activities can have a devastating impact on critical areas, including CARAs. To exempt all existing and ongoing agricultural operations from regulation is clearly an error.

  The Board further finds the Petitioners have carried their burden of proof in showing the County failed, through Title 13, to adopt an appropriate trigger for when the methodology for identifying CARAs and the protective regulations will be used. Title 13 must include adequate provisions for initiating a review for the presence of a CARA before a development permit is issued. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area

Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level II report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County & David Robinson, v. Ferry County*, EWGMHB, 02-1-0013, Final Decision and Order, (December 23, 2002).

- The limitation of the area protected to the parcel where a wellhead is located is inappropriate. An aquifer recharge area could extend beyond the parcel. The County needs to develop aquifer recharge areas criteria, which would indicate when an area needs specific scientific analysis to determine if it is a critical aquifer recharge area. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

Declaratory Ruling

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the Boards. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Motions for Reconsideration Clarification (May 27, 1997).

- The Boards have held that five-acre lots in rural areas of a county will be subject to "increased scrutiny" by the Board to assure, among other things, that the number, location, and configuration do not constitute urban growth. In the Matter of the Petition of Peter E. Overton for a Declaratory Ruling, CPSGMHB Case No. PDR 96-3-0001, February 36, 1996 (Notice of Decision Not to Issue Declaratory Ruling) 1996 WL 650335, at *3-*5. But five-acre lots are not per se violative of the GMA. The subject interim ordinance limits both the number and the location of five-acre lots in rural areas and is interim in nature. The interim ordinance allows fully 88 percent of the rural area within the County to be zoned for lot sizes of twenty acres or larger. Further a moratorium on development is placed upon industrial and commercial development presently totaling 11,360 acres. *City of Moses Lake v. Grant County*, EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

Deference

- With regard to the "variance clause", the Board recognizes the necessity for administrative discretion. However, that discretion cannot be so broad as to greatly weaken the regulations required under the Growth Management Act. Any discretion allowed in administrative action must be within well-defined standards. Such standards are not evident here. The "variance clause", Section 12 of the ICAO, reenacted here, is non-compliant with the GMA. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- *Achen v. Clark County, supra,* cited by the County, does not require the Board to approve the 2.5-acre lot in rural areas. In that case the Superior court did direct the Board to give deference to the County, especially with rural density. However, the Board decision was not reversed as to a similar size lot or did it give direction to accept a 2.5-acre lot size. What it did was tell the Board to give deference as the new legislation asked, and do so in that case. This Board does give great deference to the County decisions so long as they are in compliance with the GMA. The discretion given to the County is very broad, but must fall within the sideboards of the GMA. This density is outside those sideboards. *City of Moses Lake v. Grant County,* EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

- We disagree with the statement made by the County that "the GMA gives the County, … the authority to determine appropriate lot sizes and uses in rural areas," if that statement means that the County believes there is no role for the GMA in that decision. The GMA does limit the amount of previously unbridled discretion of local governments to "determine appropriate lot sizes and uses in rural areas." This is because of RCW 36.70A.060, .070, .170, and .020(8). *City of Moses Lake v. Grant County,* EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

- Within a framework of certain state mandates and regional policies, the GMA leaves broad discretion for locally adopted comprehensive plans to reflect local choices. In general, the Board is to defer to policy choices of local jurisdictions. However, the Board must determine if policy choices of the local jurisdictions conflict with the clear policy mandates that the legislature stated in the GMA. *Wenatchee Valley Mall Partnership, et al. v. Douglas County,* EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The Act requires protection of critical areas, and the county is given the opportunity to select the manner of that protection. Their choice is given great deference. *Easy, et al. v. Spokane County,* EWGMHB 96-1-0016, Order on Compliance (Sep. 23, 1997).

- The Board has been directed by the State Legislature to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of chapter 36.70A RCW. We take this seriously. The sizing of the UGA for the City of Kittitas is a prime example of where this deference is important. The City is unique. We see a small city with small and large city lots, farms and residences with horses and opportunity for industrial and residential expansion. The City planned for likely industrial development and its special needs, residential development inquiries, expectations of industrial development at the freeway interchange and continued farming on much of the industrial lands. *Cascade Columbia Alliance v. Kittitas County,* EWGMHB 98-1-0004, Final Decision and Order (Dec. 21, 1998).

Density

- The densities of uses permitted under the Airport Overlay Zone are appropriate when placed in the context of location of the airport, the Countywide Planning Policies and the small percentage of the UGA that is impacted. . *Son Vida II, a Washington limited Partnership v. Kittitas County,* EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The County is required to consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation.

The siting of high-density residential development adjacent to the airport has been recognized by the hearings boards as inappropriate and incompatible. In Abenroth *v. Skagit Co,* #97-2-0060c (Final Decision and Order, January 23, 1998) the Western Board ruled that the large size of the Bayview UGA was unjustified because there was not a showing for such a large unincorporated residential UGA. *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- RCW 36.70A.070 is very specific in its requirements. There must be maps, text-covering objectives, and principles and standards used to develop the plan. The land use element must designate the proposed general distribution and general location and extent of the uses of land, including commercial, industrial and residential areas. This section then makes a specific requirement that the land use element shall include population densities and building intensities. So vital is the need to know the specific distribution of the population that it is clearly a more specific density for population and building intensities is needed than the "low, medium or high" found in the County's Plan. *Bert and Gayle Bargmann and Greenfield Estates Homeowners' Assn. v. City of Ephrata,* **(Greenfield v. City of Ephrata),** EWGMHB Case No.99-1-0008c Final Decision and Order, (12-22-99).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- Generally 5-acre lots in rural areas would be more difficult to justify, especially if large number of such lots exist. Where the lot size is less than 10 acres in rural areas of a county, the Board must more carefully examine the number, location and configuration of those lots. It must determine whether such lots constitute urban growth; presents an undue threat to large-scale natural resource lands; thwarts the long-term flexibility to expand the UGA; or, will otherwise be inconsistent with the goals and requirements of the Act. 99-1-0016*; City of Moses Lake v. Grant County*; Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000); 99-1-0016; *City of Moses Lake v. Grant County*; Final Decision and Order; (May 23, 2000).

Development Regulations

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie*

Wagenman, v. Department of Ecology, Intervenor and Stevens County, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or bas to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- Regarding the adequacy of the development regulations to implement the listed goals of the comprehensive plan, the Board has a major concern: the development regulations must utilize best available science in protecting critical areas. Nothing in the record indicates best available science was included in these regulations. In fact, what evidence exists suggests that best available science has been rejected. RCW 36.70A.172 is specific. Best available science must be utilized in protecting critical areas. Ordinance 2001-09 is flawed by not "including the best available science in developing policies and development regulations to protect the functions and values of critical areas". (RCW 36.70A.172). We need not address each specific goal challenged by the Petitioners. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- Further, laws can be so vague that they simply are unenforceable. That is the case here. Such an ordinance cannot satisfy GMA's duty to adopt enforceable "development regulations" to "protect" critical areas. A person should be able to determine what the law is by reading the published code. Ordinance no. 109-2003 (ICAO) relies on language too vague to create an enforceable standard and therefore cannot not operate to "control" land use activities and does not satisfy the county's GMA obligation to adopt "development regulations" to protect critical areas. The enforcement measures adopted by the county provide only for ad hoc enforcement. This does not constitute a reasoned adaptive management program, particularly

where, as here, there is no provision for the monitoring of compliance. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- The county's new ICAO creates the illusion of protection by identifying a "no harm" standard. But the seemingly broad expanse of that term is undermined by the failure to define the terms and develop standards and criteria by which compliance may be measured and enforcement will be effective. The provision of the "no harm" standard is unworkable, and, ultimately, contrary to GMA requirements. L*arson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.
  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via bas as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.
  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The court of appeals, in A*nderson v. Issaquah,* 70 WN. App. 64. 851 P. 2d 744 (1993), rejected "*ad hoc* case-by-case policymaking" during design review as allowed by the city of Issaquah's design review ordinance. 70 WN. App. At 79. The court rejected the city's design review standards because they failed to contain sufficient standards or ascertainable criteria by which an applicant or the city could determine whether a given building design would pass muster under the code. *Id.* At 81. The court stated: "whenever a community adopts such standards, they can and must be drafted to give clear guidance to all parties concerned" and it is "unreasonable and deprivation of due process" to expect or allow a city to create standards on an ad hoc basis during project review. *Id.* At 82-83.

  See also: *City of Seattle v. Crispin,* 149 WN.2d 896, 905, 71 P.3d 208 (2003), which states in relevant part:

  > "however, as we recognized in *Dillingham,* the statute does not support the distinction the court of appeals draws between adjustments that are minor compared with substantial. Nor would such a rule be workable, and would perhaps be unconstitutional. We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application."

  Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB 00-1-

0016, EWGMHB, Order on Compliance, July 10, 2003.

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific plan and regulation changes. The City's requirement that limits the public's suggestions to general goals and policies is too restrictive. A process for receiving both specific and general suggestions is necessary. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003)

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Order on Motion, (May 31, 2002).

- The Comprehensive Plan is a policy document, to be implemented by development regulations. The County's actions under review here are the development regulations, Ordinance No. 2001-09. That Ordinance incorporates the pre-GMA SMP. The County's Ordinance now brings their SMP before the Board for review because the SMP is the method adopted by the County to implement that portion of the CP. The Board will review the County's SMP to determine whether the provisions therein adequately implement the Comprehensive Plan and protect or regulate as therein provided. The Board does not review the SMP itself as to its validity, but rather its use to comply with the GMA. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- In *West Seattle Defense Fund, et al. v. City of Seattle*, CPSGMHB Case No. 95-3-0040, Order Denying WSDF's Dispositive Motion, (June 16, 1995), a case cited by the City, the CPS Board made clear that a determination of whether development regulations comply with the GMA when they implement noncompliant portions of a Comprehensive Plan must be made on a case-by-case basis at the hearing on the merits:

  > The Board concludes that when portions of a comprehensive plan have been remanded with instructions to bring those provisions into compliance with the Act, and when other portions of the plan have been found to comply with the Act, the Board must determine on a case-by-case basis whether the contested portions of implementing development regulations comply with the GMA. In such circumstances, **the Board will not automatically conclude that, simply because portions of a**

comprehensive plan do not comply with the Act, all implementing development regulations necessarily also do not at p.4.

The Board finds the motion before us is similar to the case cited above. The Board concurs with CPSGMHB and finds that arguments on specific development regulations must be made on a case-by-case basis at the hearing on the merits. The Board does not have sufficient information before it to separate the compliant and non-compliant portions of these documents. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012, Second Motion Order, (July 29, 2002).

- The Comprehensive Plan establishes the County's policy and goals for the management of growth and their compliance with the Growth Management Act. Development regulations are to be adopted to implement those policies and goals. These regulations must be consistent with the Comprehensive Plan (RCW 36.70A.040). *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Final Decision and Order, (July 29,2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of* Walla Walla, *Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- The Board finds that development regulations cannot be compliant when they implement non-compliant provisions of a Comprehensive Plan. Development regulations are to implement a Comprehensive Plan (RCW 36.70.040). In this case, the Board finds the objected-to regulations implement the noncompliant portions of the Comprehensive Plan and, to that extent, they too are noncompliant. If the provisions are not compliant in the Comprehensive Plan, they are not compliant when found in corresponding provisions of the development regulations. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The provisions in the development regulations addressing the Rural Transition Zone implement the very Comprehensive Plan provisions previously found non-compliant. We find the Development Regulations implementing non-compliant Comprehensive Plan provisions to also be non-compliant. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs,(Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". 00-1-0001: Concerned *Friends of Ferry County v. Ferry County*; Final Decision and Order;(Jul.6,2000)

- Under RCW 36.70A.060(2), each county "shall adopt development regulations that protect critical areas," including fish and wildlife habitat conservation areas. The standard of protection previously enunciated by this Board is "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." RCW 36.70A.020(9) concerns conservation of fish and wildlife habitat areas and for the purpose of this issue parallels RCW 36.70A.060(2). *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The planning goals are part of the compliance requirements of the Act and apply to development regulations under RCW 36.70A.060. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- RCW 36.70A.060(2) requires that all lands designated under RCW 36.70A.170 be protected and lacks any qualifying language to suggest that regulated critical areas are a sub-set of all critical areas. All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree. *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Final Decision and Order (Apr. 10, 1997).

- The lack of listed qualifications and the great discretion given the Administrator charged with individual review of requests to modify buffers must be balanced with a clear opportunity for concerned parties to seek review. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

- The additional opportunity for a landowner to seek an administrative variance or reduction of the buffer with no showing of need and where the variance is not subject to any criteria moves the County out of compliance with the GMA. *Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

- The Board is concerned with the 21 exemptions found in subsection 22 of the Critical Areas Ordinance. Extensive changes to the shoreline are allowed by these exemptions, without indication of need, use of criteria or notice to the State or other interested parties. Without more protections, this section is not in compliance with the GMA. *Save Our Basin Society, et. al., v. Chelan County* **(Chelan County),** EWGMHB Case No. 94-1-0015, Compliance Hearing Order, (4-8-99).

- Petitioners argue the City has not adopted development regulations as required by the GMA. They contend the City has delayed that step for several years by re-enacting pre-existing regulations. They contend this process avoids GMA requirements of consistency, public participation and best available science. The record provides no evidence of a review for consistency, a use of best available science, or a process for citizen involvement in developing those regulations and the City is in non-compliance with the GMA. *Saddle Mountain Minerals, L.L.C. and Gary Maughan, v. City of Richland,* (**City of Richland**), EWGMHB, Case No. 99-1-0005, Final Decision and Order, (10-1-99).

- RCW 36.70A.060(1) in part states "…or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or minerals resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration." Ferry County Ordinance 73-1 requires as follows: "45.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development."

  Ferry County Ordinance 72-1 requires as follows: " 08.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development.

  The question was whether the notice was adequate and the county has met those criteria? The Ordinances require the specific notice be affixed on plats or permits "within or near" resource lands. The Growth Management Act requires that this notice be affixed on plats and permits, which affect lands on or within 500 feet of resource lands. The statute would prevail and the County Administrator dealing with these plats and permits must consider "within or near" the same as "on or within 500 feet of" resource lands. The Ordinances allow for this to happen. While having the "500 feet" in the ordinances would have been preferable, the County's wording was not a violation of the GMA.

  The County has complied with RCW 36.70A.060(1). The notice found in the Ordinances to be affixed upon plats and permits was word for word what the statute requires and that notice must, by law, be affixed to such plats or permits on or within 500 feet of resource lands. 00-1-0001: Concerned Friends of Ferry County v. Ferry County; Final Decision and Order; (Jul. 6, 2000)

- AC 365-195-805(3) states:

  "(3) Adoption schedule. The strategy should include a schedule for the adoption or amendment of the development regulations identified. Individual regulations or amendments may be adopted at different times. However, all of the regulations identified should be adopted by the applicable final deadline for adoption of development regulations."

  While it may have been appropriate to adopt the development regulations more timely, the Board finds the language in WAC 365-195-805(3) is directive only. Words "should" and

"may" be do not have the same weight as words like "shall". 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Jul. 6, 2000).

- RCW 36.70A.040(4)(d) states: ". the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations." (Emphasis added). The Respondent, having adopted its Comprehensive Plan in 1995, should have by this time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially where, as to the RSAs, they stand-alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. This was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision was needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Jul. 6, 2000).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County*, **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County*, **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Final Decision and Order, (8-23-99).

Discretion of Local Government

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *Merrill H. English and Project for Informed Citizens v. Board of County*

Commissioners of Columbia County, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- Each community is both given discretion and encouraged to create its own "vision of urban development." This "community vision"" is constrained in two ways. First, a community must provide adequate public facilities and services. Implementation of its plan may not decrease current service levels below locally established minimum standards. Second, sprawl is to be discouraged. This is the essence of the growth management process – a community taking responsibility for its future, developing a consensus for its future development and checking to ensure its plan is feasible. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- While there is opportunity for the exercise of local judgment, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- This is a legislative process. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public and private contacts. This does not mean, however, that local governments are free from constraints imposed by the GMA. The Act sets minimum requirements that may not be overridden, and it requires that actions taken be consistent with the record. Local governments may choose from a wide array of alternatives, provided they employ a valid public process and the record substantively supports their decision. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). A county should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- A county has a range of discretion in making this determination and the extent of any particular designation may vary from county to county depending on the level of protection above the minimum requirement they choose to grant the industry, but the baseline test is always whether the land is commercially significant over the long-term. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- Within a framework of certain state mandates and regional policies, the GMA leaves broad discretion for locally adopted comprehensive plans to reflect local choices. In general, the Board is to defer to policy choices of local jurisdictions. However, the Board must determine if policy choices of the local jurisdictions conflict with the clear policy mandates that the legislature stated in the GMA. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act,

but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- The Board will not substitute its judgment for that of the County. The Board must allow the County the discretion the Legislature intended and recognize and defer to the expertise of the County in designating its resource lands. *Victor W. Belaire et. al. v. Yakima County*, **(Belaire v. Yakima County),** EWGMHB, Case No. 99-1-0003, Final Decision and Order, (7-22-99).

- This Board is not the place to examine the motivation of the legislative bodies in their adoption of amendments. We do not have the authority to examine their motivations, just the results and process. The City's motivation is immaterial to our decisions. *Bert and Gayle Bargmann and Greenfield Estates Homeowners' Assn. v. City of Ephrata*, **(Greenfield v. City of Ephrata),** EWGMHB, Case No. 99-1-0008c, Final Decision and Order, (12-22-99).

- We find the reasoning of the Washington Appellate Court in Diehl v. Mason County, 94 Wn.App. 645, 972 P.2d 543 (1999) persuasive: " Local governments have broad discretion in developing CPs and DRs tailored to local circumstances. But this discretion is limited by the requirement that the final CPs and DRs be consistent with the requirements and goals of the GMA." Id., 94 Wn.App. at 651 [quotations omitted]. A fundamental requirement of the GMA is that development regulations be consistent with and implement comprehensive plans, RCW 36.70A.040(4)(d), and we find that the development regulations that are the subject of this proceeding are neither consistent with nor implement Yakima County's comprehensive plan. 00-1-0009: *Beatrice M. Bertelsen, et al. v. Yakima County, et al*.; Final Decision and Order; (Nov. 2, 2000)

Dismissal

- The Growth Management Hearings Boards have only the authority the State Legislature granted it under the GMA. Where the parties do not agree to a continuance of the matter and other authority for such a continuance does not exist, a continuance beyond the 180 days is not appropriate. The matter is dismissed. *Husum Citizens Group v. Klickitat County*, EWGMHB 00-1-0004 Order of Dismissal (January 11 2002).

- The failure of the Petitioner to brief the issues for the final hearing on the merits was an abandonment of those issues and those issues may be dismisses. If all the issues are not briefed, the petition may be dismissed. 00-1-0006: *Gary D. Woodmansee v. Ferry County;* Final Decision and Order; (Sep. 7, 2000)

Dispositive Motion

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA

proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of Wildlife Habitat Injustice Prevention, et. al. v. City of Covington, CPSGMHB, 00-3-0012 (Order on Motions 11-16-00) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.
Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake, a municipal corporation, v. City of Spokane Valley, A municipal corporation,* EWGMHB, Case No. 03-1-0009, Order on Motions, March 23, 2004.

- The Board does not grant dispositive motions lightly. This case is fitting, however, for such a motion. No genuine issue of material fact exists and administrative efficiency is advanced. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB 95-1-0001, Dispositive Motion and Final Order (Jun. 6, 1995).

Essential Public Facilities

- With regards to the siting of essential public facilities, the Board finds no provision in the law that would require the County to follow the Steering Committee's recommendation, regardless of what the CWPPs state. The CWPPs are to be followed by the County, but only to the extent allowable under existing law. The County cannot delegate its statutory responsibility to the Steering Committee. Therefore, its actions, retaining final authority for decision-making could not be found by this Board to be out of Compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

Evidence

- The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including

from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- As in the King County case above, we find here "the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra,* P.142.

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order Denying Motion for Reconsideration, (11-24-99).

- The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra,* at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County,* EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County,* EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

  Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC. It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the evidence presented. 00-1-0008: *David M. Abercrombie v. Chelan County*; Order on Dispositive Motion; (Jun.16, 2000).

Exhaustion

- The County contended the Petitioner must exhaust their administrative remedies prior to the GMA challenge of the effect of an ordinance on critical areas. The Petitioner filed an appeal with the Ferry County Board of Commissioners shortly after the publishing of the notice of determination of non-significance. The County believed the Petitioner should not challenge the effect of the ordinance on critical areas through GMA review until they have received an answer from their SEPA appeal.

  The Petitioner contends the Petition for Review is a separate and distinct action from the SEPA appeal. They contend the County has provided no evidence that the two actions are similar or analogous in any manner. Both actions were generated by the Timber Forest Practices Ordinance, (TFPO), yet they each have their own characteristics. The Board has found it has separate subject matter jurisdiction to review the affects of this legislative action upon the Comprehensive Plan. The Petitioner is not asking us to review compliance with the Timber and Forest Practices Regulation. Had the Petitioner waited until the SEPA appeal is resolved, the time would have passed for them to file a petition under the GMA.

  This petition raises separate issues that can be decided by this Board under the GMA. It is not necessary for the Petitioner therefore to exhaust the administrative remedies under SEPA. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion to Dismiss, (9-29-99).

Expert

- The Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure that the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional.

  Title 13.20.020 provides: "The applicant, Planning Department, agencies with expertise and often times, a qualified professional may (emphasis added) be involved in the mitigation process." This provision is inadequate. Mitigation, to ensure protection, must be determined by a qualified professional.

  The Board finds that if a qualified professional were to determine the mitigation requirements when mitigation is called for, Petitioners would have failed to carry their burden on the other mitigation arguments. Ratios for replacement, enhancement, etc., if determined by a professional, can be expected to protect the critical area. Likewise, before a "reasonable use" exception is granted, a professional determination of any mitigation measures required ensures the protections necessary.

  The Board recognizes off-site mitigation compensation sometimes is necessary and appropriate if the functions and values of the affected critical area are maintained or enhanced. However, this determination also can be made only by a qualified professional. Petitioners have failed to carry their burden of proof with the exception of their argument for use of a qualified professional. By failing to require the use of a qualified professional in determining mitigation measures, Title 13 fails to protect critical areas, and is clearly erroneous. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra,* at 532.

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County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

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  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to

protect critical areas. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is generally one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes includes an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional. Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified professional fail to protect critical areas and are clearly erroneous. . *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.
  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First,

it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via bas as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County & David Robinson, v. Ferry County*, EWGMHB, 02-1-0013, Final Decision and Order, (December 23, 2002).

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision is based on a sound, reasoned process that includes best available science. The County consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. 97-1-0018: *Concerned Friends of Ferry County v. Ferry County;* Second Order on Compliance; (May 23, 2000).

- The Board recognizes financial limitations in Ferry County preclude the option of hiring consultants for scientific review. With this in mind, the Board recommended that Ferry County "consult with" appropriate experts within governmental agencies. Contrary to the contentions of Ferry County, the Board does not believe the County followed this advice. The County has provided no evidence in the record of any scientific review of the issues in this case. Even the one response received does not imply a scientific review. The Board does not accept "no comment" by state agencies as compliance with RCW 36.70A.172. The Board's recommendation was to consult with appropriate agencies to utilize their expertise.

Simply mailing a proposed section of the comprehensive plan, without discussion or collaboration, without substantive response, is not compliance with either our order or with RCW 36.70A.172. The process must be collaborative, with the result being either incorporation of BAS recommendations in the final document, or a justification for not including those recommendations. 97-1-0018: *Concerned Friends of Ferry County v. Ferry County;* Third Order On Compliance; January 26, 2001.

Failure to Act

- The Board finds the earlier Compliance Order was a "failure to act" order. Thus, Ferry County, by adopting policies addressing aquifer recharge areas, has complied with the order. Any decision regarding substantive issues in that action can only be made after a new petition is filed and arguments heard. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB, 97-1-0018, Fourth Order on Compliance, (June 21 2002).

- RCW 36.70A.280(2) does not limit standing to parties appearing before the county's legislative authority. Since the county has yet to hold a public hearing, such a narrow construction would effectively bar the petitioner from making its claim. Local governments may not evade the requirements of the GMA by failing to comply with the Act's deadlines. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

Fish and Wildlife Habitat Conservation Areas

- Upon review of the arguments of the parties and review of the party's briefing and the determination that the ICAO, which this board found out of compliance, was not repealed or in any way modified, the Board determines the ICAO continues to be out of compliance with the Order of this Board and the GMA. The Board further finds that Title 13 is better reviewed in the case begun pursuant to the new petition, now filed under case Number 03-1-0003. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or bas to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016, EWGMHB, Order on Compliance, November 13, 2003.

- The growth management act (GMA) requires a county's adoption of development regulations to protect the functions and values of critical areas, recognizing particularly fish and wildlife habitat conservation areas, and substantively considering bas when adopting those

regulations. RCW 36.70A.060(2), .020(8), WAC 365-195-825(2)(b) and .172(1). Development regulations are "controls" placed on development or land use activities. RCW 36.70A030(7). The county must use bas both to develop critical areas regulations and also to evaluate their effectiveness in providing the protection required under the GMA. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision was based on a sound, reasoned process that includes best available science. The County has consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. (See 1E.). 97-1-0018: *Concerned Friends of Ferry County v. Ferry County;* Second Order on Compliance;(May23,2000).

- RCW 36.760a.030(5) and WAC 365-195-410 defines critical areas. Fish and Wildlife Habitat Conservation Areas are considered critical areas under the act. furthermore RCW 36.70A.170(2) states:

  > "In making the designations required by this section, counties and cities shall consider the guideline established pursuant to RCW 36.70a.050."

  Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB 00-1-0016, EWGMHB, Third Order on Compliance, November 14, 2003.

- WAC 365-190-080(5) provides that a process must be in place to allow for the designation and protection of species of local importance. At the present time, there is no procedure for such designation.

  The Board is convinced that a lack of standards or criteria for determining "significance" of a development activity can and must be addressed. Petitioners identifies a letter in the record from the Department of Commerce Trade and Economic Development suggesting certain activities which should be regulated in habitat conservation areas. Ex. 44.

  The County provides no basis for deviating from Department of Fish and Wildlife recommended buffers and setbacks to protect wild salmonid and other threatened endangered or sensitive species. The DFW guidelines must be followed in the absence of provisions for mitigation, or scientific evidence that supports a different buffer or setback. *Friends of Ferry County v. Ferry County*, 97-1-0018. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Final Decision and Order, July 13, 2001.

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (11-30-99).

Forest Lands

- The Board finds that if land meets the criteria for forestland designation under RCW 36.70A.170, it must be designated with one limited exception. Local discretion is retained to avoid clearly anomalous results. *Ridge, et al. v. Kittitas County,* EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- There are three factors for determination of "long-term commercial significance": (1) the growing capacity and productivity of the land, (2) the land's proximity to population areas, and (3) the possibility of more intense uses of the land. These criteria are not independent and must be evaluated in relation to each other. That these factors must be "considered with" each other necessarily requires the consideration of the relative significance of each factor. Physical proximity to population areas, in and of itself, does not preclude designation. The Growth Management Act places a high priority on conserving resource lands and reducing sprawl. Designation of resource lands was the first required task. Indeed, forestlands of long-term commercial significance may be located within urban growth areas in certain circumstances. There must be good faith consideration and showing that the effects of proximity to population areas are significant and unduly burdensome to avoid designation. Similarly, consideration of the possibilities of more intense use of the land must be based in real possibilities, sufficiently quantified to be considered in good faith. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- If qualifying forestland is not proximate to population areas it should be designated. The reverse is not necessarily true. Forestlands of long-term commercial significance may, under limited conditions, be inside urban growth areas. The extent to which a population area impacts forestland is the determining factor. Thus, an 80-acre parcel that elsewhere in the state might be properly designated forestland, might not so qualify if it abutted the City of Seattle. It is the level of impact placed on the property, rather than its location that is determinative. It is the burden of increased management and other costs that disqualifies the property. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- Planning options are retained by initial designation of resource lands. In order to fulfill the Growth Management Act's mandate to conserve resource lands, the initial designation should err on the side of inclusion. As more information is developed, a county can easily make changes at the comprehensive plan stage – this is the logical place for a weighting of the competing goals of the Act. Further, nothing in the Act limits a county's authority to amend its ordinance as conditions warrant. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- For counties planning under the Act, the Board finds that forest land "designations" made pursuant to RCW 36.70A.170 are inseparable from the development regulations required for their protection under RCW 36.70A.060 and must be guided by the planning goals of RCW

36.70A.020. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- That U.S. Forest Service lands were designated forestlands by the county is not a significant point. While the Act derives its authority from the State of Washington and as such lacks authority over federal lands, nothing in the Act precludes such a designation for county purposes. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Division of forestlands into parcels too small to be efficiently managed for commercial timber production removes these lands from forest production. Additionally, as an incompatible adjacent use, it hinders ongoing commercial timber production on adjacent unconverted lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Lands encompassed within the "forest resource lands" definition are to be designated. Lands falling outside this definition are not designated. *Ridge v. Kittitas County*, EWGMHB 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- If land cannot be economically or practically managed for commercial forest production, it may be excluded from the "forest resource land" classification. *Ridge v. Kittitas County*, EWGMHB 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- A county can be found in noncompliance, based on an examination of the record below, if it failed to designate all lands that meet the definition of forestlands, unless these lands are located within a UGA. This Board has held in previous cases involving these same lands that RCW 36.70A.170(1)(b) requires counties and cities to designate all lands that met the definition of forest lands and RCW 36.70A.060(1) requires that counties and cities adopt development regulations to assure the conservation of all these designated forest lands. Within urban growth boundaries, these lands must be designated only if the city or county has enacted a program authorizing transfer or purchase of development rights. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Final Decision and Order (Mar. 28, 1997).

- The standard for designating critical areas and forestlands is "land use designations must provide landowners and public service providers with the information needed to make decisions." Given the recognized deficiency in the maps in this case, it is necessary to follow up that designation with a process, which includes on-site inspections as permits are processed. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Order on Compliance (Apr. 16, 1997).

- RCW 36.70A.170(1)(b) requires cities and counties to designate forestlands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber. Counties are not required to designate lands that may be forested today but do not meet the requirements for lands of long-term commercial significance. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The legislative changes in the "forest land"" definition replaced "primarily useful for growing trees" with language mirroring that of "agricultural lands" by including "primarily devoted to." However the legislature went further. Four factors were added to the definition

to use in determining whether the land was indeed "primarily devoted to" growing trees commercially. None of these four factors involves the landowner's intent. Further, additional factors were not added to the definition of "agricultural lands." *Ridge, et al. v. Kittitas County,* EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

Frequently Flooded Areas

- It is the County's obligation to include best available science in the designation and protection of frequently flooded areas. Ferry County, by its failure to demonstrate otherwise, forces this Board to conclude that best available science was not included in developing policies in the sections of the SCAP under review. The contention that the silence of the reviewing Department is considered approval and constitutes consideration and inclusion of best available science is not correct. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order Denying Motion for Reconsideration, (11-24-99).

Geologically Hazardous Areas

- Petitioners provide no supportive argument that Ordinance 2001-09 fails to protect Geologically Hazardous areas. The Board notes Section 4.00 of Ordinance 2001-09 addresses frequently flooded areas. Petitioners have offered no argument regarding the adequacy of that section. We must presume the validity of the County's action. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

Goals

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The balancing of various goals under GMA occurs during development of the comprehensive plan. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County,* EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The Board holds that there are both procedural and substantive aspects to compliance with the planning goals of RCW 36.70A.020. Procedurally, the county legislative authority must "consider" these goals when they adopt Interim Urban Growth Boundaries. What does "consider" mean procedurally? There is no requirement for a tangible procedural demonstration nor will the Board attempt to read the collective minds of the county's elected officials or staff to determine whether they considered the GMA's planning goals when adopting development regulations that designated Interim Urban Growth Areas. Instead, the ultimate test of consideration of the goals remains whether the county's actions were substantively guided by the goals – whether their actions are consistent with the planning goals. While this approach does not require written findings of consideration or a record that carefully considers the planning goals from a procedural view, such finding and/or valid consideration in the record of the relevant goals is useful, if not, essential to making a determination as to whether a county's adoption of its Interim Urban Growth Area was substantively guided by the planning goals. The advantage of this approach is that it deals with the heart of the question, the substantive element, instead of a possible pro forma procedural exercise. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- Without doubt, there is an inherent tension between some of the planning goals. All of the goals must be given effect to the extent possible. Thus, Planning Goal 5, economic development, may rightly be given high priority by a community. However, this does not sanction sprawl where there is no showing that both goals cannot be achieved. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- Planning Goal, Economic development, is conditioned by the requirement of Planning Goal 1 that it be "within the capabilities of the state's natural resources, public services, and public facilities." Similarly, Planning Goal 12 requires a showing that public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. The Board is not saying that "every T must be crossed and every I dotted" to meet this requirement, but a good faith valid discussion must take place. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- For counties planning under the Act, the Board finds that forestland designations made pursuant to RCW 36.70A.170 are inseparable from the development regulations required for their protection under RCW 36.70A.060 and must be guided by the planning goals of RCW 36.70A.020. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- The Act encourages the protection and development of natural resource industries while at the same time allowing economic growth. It, further, protects natural resources, including critical areas, to ensure "the high quality of life enjoyed by the citizens of this state." While achieving these goals is clearly possible, reconciling non-compatible land uses is never easy. The concerns and needs of real people, facing real problems, are involved. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The planning goals are part of the compliance requirements of the Act and apply to development regulations under RCW 36.70A.060. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Consideration of the planning goals in RCW 36.70A.020 is part of the comprehensive plan process. A local government selects and weighs these goals in the light of relevant information to achieve its desired plan. The plan should harmonize the goals, giving the greatest effect possible to each goal. In situations where goals conflict, the local government may make a reasoned determination. *Ridge v. Kittitas County*, EWGMHB 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- Procedurally, the county legislative authority must "consider" these goals when they adopt IUGA boundaries. However, there is no requirement for a "tangible procedural demonstration." Instead, the ultimate test of consideration of the goals was whether the County's actions were substantively guided by the goals – whether their actions are consistent with the planning goals. The Board holds the substantive compliance test also applies to urban growth area designations under RCW 36.70A.110. However, written findings of consideration or a record that carefully considers the planning goals from a procedural view are useful, if not essential in some cases, to make a determination of substantive compliance. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The question of compliance with RCW 36.70A.020(2) (sprawl) is not whether development should be precluded from agricultural resource lands, but the nature of the allowed development. Property developments, which support the agricultural industry, and these, encompass a wide range of uses, are necessary for its future vitality. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the Ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The Board has consistently recognized that the planning goals may be at some point inconsistent. It has also found, in almost all cases, that potential inconsistencies may be

successfully reconciled. Counties and cities have a duty to attempt to harmonize the goals. They must consider and show their work where they cannot. It is one thing to suggest that achieving the housing goal conflicts with the goal of reducing sprawl, it is quite another to show that these goals cannot both be achieved. Where a jurisdiction holds that one planning goal should be sacrificed at the expense of another, the record must show the decision making process. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- If a jurisdiction is unable to harmonize the planning goals, the record must show that the decision makers engaged in a valid process and considered the matter. This is the "show your work" standard. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

- As the County stated in their brief, performance standards are defined as land use regulations based upon application of specific standards, relating to actual impacts of a proposed development. The Board does recognize that performance standards can be used in successful growth planning. However, the standards must advance the goals of the GMA. The only "standard" that appears to be different from what would normally be required for a building lot is the required access to a paved road. This does not reduce urban growth in rural areas. It does allow extensive growth along the paved County roads. It encourages urban sprawl. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Habitat and Species of Local Importance

- While the Board in its majority opinion, ruled that the County's nomination process is compliant, that is not to say that the County has designated and protected habitats and species of local importance. While at this point it is not possible for the Board to determine if the nominated species should be designated and protected, the County's failure to respond to nominations is clearly a failure to designate and protect. Stevens County must, as affirmed in *WEAN* make a reasoned analysis, on the record, including best available science and take official substantive action on nominations. To fail to respond is clearly erroneous, and a failure to designate and protect habitat and species of local importance. By failing to respond to nominations of species and habitat of local importance, Stevens County has failed to protect species and habitat of local importance. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County has not provided sufficient evidence that BAS was considered or included in its designation of priority species or habitat areas for priority species. The County provides no rationale for excluding species designated by DFW. The Board finds that Petitioners have met their burden of proof that Ferry County acted erroneously in the designation of priority species and habitat areas *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

Historical and Archeological Sites

- The Board finds that the issue is timely, and in effect, a failure to act challenge. RCW 36.70A.020(13) provides counties must: "Identify and encourage the preservation of lands, sites, and structures, that have historical and archaeological significance." RCW 36.70A.040(4)(d) requires development regulations to implement the above stated GMA goal. Ordinance 2001-09, having failed to address historic and archeological issues, is non-compliant. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

Industrial Development

- RCW 36.70A.070(5)(d)(iii) contemplates the rural industrial uses permitted (but not required) by the County. However, the application of (5)(d)(iii) is limited by that paragraph's reiteration of the Act's prohibition of low-density sprawl and by (5)(d)(iv)'s requirements to minimize and contain any existing areas or uses of more intensive rural development. While the Board recognizes that (d)(iv) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. . 99-1-0019 *James A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000); 99-1-0016; *City of Moses Lake v. Grant County*; Final Decision and Order; (May 23, 2000)

- RCW 36.70A.070(5)(d)(iv) requires the County to "adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical boundary or the existing area or use, thereby allowing a new pattern of low-density sprawl. (Emphasis added). Subparagraph (v) defines an existing area or existing use as one in existence on July 1, 1990. 99-1-0016; *City of Moses Lake v. Grant County;* Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

Innovative Techniques

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques. …Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." P.143.

- As in the King County case above, we find here "the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra*, P.142.

- While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- It is the combination of errors and process defects that leads us to issue our order of invalidity. This is a significant land use matter for the citizens of the community and their right to participate in a meaningful manner must be respected and protected. Growth Management Act provides this protection. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- An order of invalidity is appropriate where there is a "potential for vesting" of inappropriate land uses during a period of remand. *Vashon-Maury v. King County*, 1997 WL 1717577 *8 (1997). The Board in *Bennet v. City of Bellevue*, 2002 WL 31549122 *12(2002) recognized that invalidation was appropriate where the continued validity of the ordinance would potentially allow for vesting. The Board found:

  > Further, the Board finds that the continued validity of the Ordinance would allow additional vesting of permits to an inappropriate land use regulation . . .

  Neighbors for Responsible Development, v. City of Yakima, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

Interim

- Relying on unnamed regulations to enforce the protection of critical areas is inadequate. Also, the use of the standard "minimize impact" is inadequate. There must be a specific, objective standard for review in the ordinance that will protect with reasonable certainty. The required standard of protection should be to "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. Counties' critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

Interim Urban Growth Areas (IUGAs)

- RCW 36.70A.110 requires that counties, in consultation with the cities involved, establish Interim Urban Growth Areas based upon population projections submitted to planning counties by the Office of Financial Management and distributed within the various

jurisdictions of the county by means devised by the county. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The Board finds that the "based upon" language of RCW 36.70A.110 imposes an upper boundary to an Interim urban Growth Area's size for the following reasons. First, if the "based upon" language established only a "minimum," one of the underlying principles of the GMA, containment of urban sprawl, would be undermined. Second, if Counties were free to use population forecasts in excess of OFM's forecast, there would be little need for the specific appeal right granted to dispute OFM's forecast. Third, the GMA allows "new fully-contained communities" to be established outside of urban growth areas. But if a county chooses to do so, it must "reserve a portion of the twenty-year population projection and offset the urban growth area accordingly for allocation to new fully contained communities." If OFM's twenty-year population projections were just minimums, there would be no need to "offset" additional population to be housed in new fully contained communities. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The Act requires designation of an IUGA "based upon" the expected population growth for the next twenty-year period; a city's service plans are independent of the designation. A city is free to plan for service levels as it chooses, but its planning choices are separate and independent from its obligation to comply with RCW 36.70A.110. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- A county cannot adopt an "expand now contract later" IUGA that allows unwarranted annexation, annexation which would not be allowed if the IUGA were properly sized. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The inclusion of supportable land use factors grants substantial discretion to each jurisdiction designating an IUGA, yet provides a yardstick that ties and constrains the designation to the OFM population forecast. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The State Legislature adopted separate public participation requirements when they adopted the direction to establish the IUGAs. If the Legislature had wanted the counties to meet the requirements of RCW 36.70A.140, it would have been easy for them to do so. It did not. The process of designating IUGAs does not require the same public participation required for the development and adoption of the comprehensive plan. *Howe v. Spokane County*, EWGMHB 97-1-0001, Final Decision and Order (Jun. 19, 1997).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act, but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances

and traditions. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- In order for counties to make an informed choice as to the location of IUGAs, cities must first provide counties with detailed information about their size, population, population densities and zoning. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designations. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the FUGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- The requirement to establish an Interim Urban Growth Area requirement was adopted by the Washington State Legislature as an amendment to the GMA. (1991) The IUGA is to be established early in the planning process and has the effect of limiting development outside such boundary unless it is later determined additional land is needed for the allocated of the real growth of that City. If the City/County is to err, it is hoped they err on the side of having too few buildable lots available in the IUGA and make any necessary corrections in the Final Urban Growth Area (FUGA). *Kenneth and Sandra Knapp et. al., v. Spokane County*, (**Spokane County**), EWGMHB Case No. 97-1-0015c, Order on Motion for Reconsideration, (9-30-99).

Invalidity

- In considering invalidity, the Board must consider whether the non-compliant provisions of Ordinance 75-2000 substantially interfere with the growth management act (GMA). (RCW 36.70a.330 (3). Further, the board may consider "the extended length of time that (a county) has been without a compliant ordinance… may well approach substantial interference with the act and be grounds for a finding of invalidity." *Diehl et al v. Mason county*, 95-2-0073. The board also notes the western board decision in S*eaview Coast Conservation Coalition v. Pacific County*, 95-2-0076:

> "In making the decision regarding the scope of invalidity, we take into account the local government's compliance or non-compliance with the act along with current and past efforts to achieve compliance to meet the deadlines established by the legislature."

Section 13.00.040, of title 13, provides that the more restrictive development regulation shall apply, if there is a conflict. Petitioners point out the new CAO (title 13) reduces buffer requirements for type 1 waters from 150 feet (high intensity uses) to 100 feet, and for type 5 waters from 50 feet (high intensity uses) to 25 feet. While the interim critical areas ordinance remains out of compliance, the finding of invalidity of the setback/buffer provisions contained therein will weaken protections while the county pursues their compliance with the GMA. The board therefore denies petitioners' request for a finding of invalidity. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- The Board finds no legal authority to declare invalid portions of a comprehensive plan where no order of non-compliance has been issued. Further, under the facts alleged by the Petitioner, the Board does not believe a finding of Invalidity should be issued. The determination of Invalidity requires a finding of non-compliance and a determination that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA. The Board does not find that this is the case. *Ridge v. Kittitas County et al.* EWGMHB 00-1-0017, Compliance Order, (April 10 2002).

- The Petitioners have a heavy burden when seeking invalidity of all or part of the comprehensive plan or development regulations. The Board must first find the County out of compliance and then find those noncompliant actions to substantially interfere with the goals of the GMA. This is not something the Board does lightly. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB, 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Respondent's second motion seeks the dismissal of Petitioners' Issue No. 5, Petitioners' request for a finding of Invalidity. The Respondent contends this issue has been addressed in our previous cases Walla Walla, Nos. 01-1-0014cz and 01-1-0015c. As above, Petitioners argue that subsequent events may have changed the facts surrounding the Boards earlier decision to not declare the Comprehensive Plan invalid. The Board recognizes that there are unresolved material facts and will hear arguments on the question of invalidity at the Hearing on the Merits. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County,* EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- The Petitioners have requested a finding of invalidity relating to development regulations for the Blalock Area. The Board notes recent action by the County imposing a moratorium on development in that area. The moratorium accomplishes what an Order of Invalidity would. Therefore, because the County has protected these lands from development under the noncompliant provisions of the Comprehensive Plan or its regulations, a finding of Invalidity is not necessary at this time. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The Board rarely invokes invalidity. Invalidity can only be invoked when the Board finds the actions taken by a city or county seriously impair the goals of the GMA. In this case, we find such impairment exists. For the GMA planning process to work, citizens must have confidence in the planning process. The public must be heard before commitments are made. Here, they were not. The development and signing of the Memorandum of Understanding is

a part of the development and enactment process of the amendment of the comprehensive plan in this case. The Board declares the actions taken by the City, in its amendments of the Comprehensive Plan, to be invalid. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- If it is determined that a comprehensive plan or development regulation "would substantially interfere with the fulfillment of the goals" of the GMA, the Board may invalidate that part or parts of the plan or regulation. *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn.App. 657, 666, 997 P.2d 405 (2000). Invalidity is a matter of the Board's discretion to be determined on a case-by-case basis. *King County v. Central Puget Sound Growth Management Hearing Board,* 138 Wn.2d at 181, citing *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 561-62, 958 P.2d 962 (1998). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The primary factor to be considered in the context of invalidation is whether continued validity of the plan amendment would substantially interfere with the goals of GMA. RCW 36.70A.320(1)(b). The City of Yakima cites *Whidbey Environmental Action Network v. Island County,* 1997 WL 652518 (1997) as establishing a "three-part test" for analyzing the "substantial interference" standard of GMA. The Board indicated that it will "keep in mind" the following factors:

  Hence, whether a development regulation meets GMA's test of substantial interference depends on three factors:

  a. The magnitude (or egregiousness) of the violation of GMA;
  b. How long the violation has occurred;
  c. How much longer it will likely occur absent invalidation.

  Neighbors for Responsible Development, v. City of Yakima, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order Denying Motion for Reconsideration, (11-24-99).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- Because of the vast acreage involved (over 15,000 acres) and the imminence of harm, only a finding of invalidity can serve the GMA's core purpose of promoting land use planning according to the goals set out in the Act. Without a finding of invalidity, applications for the

development of a major resort on land this Board has twice already found to be forestlands may be filed and vest. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Final Decision and Order (Mar. 28, 1997).

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the Boards. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Motions for Reconsideration Clarification (May 27, 1997).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- This Board takes the issue of invalidity very seriously and finds invalidity only if a County has substantially interfered with the fulfillment of the goals of the Growth Management Act.

  While the Board holds that public participation is the heart of the Growth Management Act, the Petitioners have not shown that failure to comply with the public participation requirement substantially interfered with the goals of the GMA. *Saundra Wilma, et. al. v. Stevens County,* **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

  Stevens County Superior Court, 1999 2 002693 entered a decision on appeal from a final decision of the Eastern Growth Board. The Superior Court directed the Eastern Board to invalidate Stevens County's IUGAs *ab initio.* The Order entered by the Easter Board remanded the matter to the County with directions to take action consistent with the Courts Decision on Appeal. *Wilma et al. v Stevens County.*

- Determination Of Invalidity: The Petitioners asked the Board to find the Ephrata UGA boundary invalid. The Petitioners believed the City would annex areas 4 and 5 because the Board found the City out of compliance without a finding of invalidity. The City, to a question from the Board, responded that it had no intention of annexing the property in the foreseeable future.

  The Board concluded that it was inappropriate to make a determination of invalidity. The Petitioners had not met their heavy burden of showing how the continued existence of the Ephrata UGA would substantially interfere with the fulfillment of the goals of the GMA. The fear of annexation does not reach that level. If, however, the City were to consider an annexation petition, the Board would look with favor upon a request for a finding of invalidity. The finding of Invalidity was not issued. 99-1-0013; Bert *and Gayle Bargmann v. Grant County*; Final Decision and Order; (May 19, 2000).

- The Board found that the Superior Court's invalidation of Stevens County Resolutions, 16-1997 and 149-1997, invalidating the interim IUGAs ab initio, causes the issues raised in this

matter to be moot. 99-1-0010c: *Harrison, et al. v. Stevens County*; Order of Dismissal; (Oct. 25, 2000)

- The Petitioners have asked the Board to find Stevens County's Titles 4 and 5 invalid under RCW 36.70A.302. The Board may determine all or part of a comprehensive plan or the development regulations are invalid if the board: (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; (b) Finds that the continued validity of those parts of the regulations would substantially interfere with the fulfillment of the goals of the GMA; and (c) Specify the particular part of parts of the regulation that are determined to be invalid, and the reasons for their invalidity. RCW 36.70A.302(1). . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order on Motion for Reconsideration (December 13, 2001).

- The Board is hesitant to make a finding of invalidity except in the most serious cases. The finding of invalidity is a very serious determination. The County can suffer serious burdens and cost resulting from such a finding. It is for these and other reasons that the Board rarely finds all or portions of a County's action invalid. It is also for these reasons that the Washington State Legislature, in 1997 amended the Growth Management Act (GMA) to further restrict the Board's ability to find invalidity and also empower Counties or Cities to seek clarification or removal of such a finding. (Chapter 429, Laws of 1997). 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order on Motion for Reconsideration (December 13, 2001).

- RCW 36.70A.302(6) now allows counties and cities to request a clarifying, modifying or rescinding a determination of invalidity. There is no time limit for the filing of such a request in the statute or in the rules adopted to implement that statute. It is clear from the Statute that the State Legislature intended to give the Cities and Counties this flexibility.

  Stevens County was not required to file their request for clarifying, modifying or rescinding the determination of invalidity within 10 days of the service of the final order. RCW 36.70A.302(6) and WAC 242-02-833 do not set a time for such filing. This Board has jurisdiction to hear the County's motion. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order on Motion for Reconsideration (December 13, 2001).

- RCW 36.70A.302(b and c) requires the Board to support its findings of invalidity by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter. That section also requires the Board to specify in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity. Nowhere is the Board required to give reasons why other sections of the plan or regulations are not found invalid. Upon review of the GMA and our original FDO the Board found there were many portions of Titles 4 & 5 that did not **substantially** interfere with the fulfillment of the goals of the GMA. Because the Board is required to specify the particular part or parts of the plan or regulation that are determined invalid, the Board limited the invalidity to those discrete sections that did substantially interfere and not whole titles. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order on Motion for Reconsideration (December 13, 2001).

Jurisdiction

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of Wildlife Habitat Injustice Prevention, et. al. v. City of Covington, CPSGMHB, 00-3-0012 (Order on Motions 11-16-00) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

  Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake, a municipal corporation, v. City of Spokane Valley, A municipal corporation,* EWGMHB, Case No. 03-1-0009, Order on Motions, March 23, 2004.

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Order on Motion to Dismiss SEPA Issues, July 31, 2003.

- The GMA recognizes a distinction between specific project review and comprehensive land use planning. "Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions." RCW 36.70A.470(1). The Legislature intended the above provision to provide for consideration of potential amendments to a local jurisdiction's GMA plan and regulations identified or discovered during project review. *LMI v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 10. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- The actions of the County are non-reviewable by the Growth Management Hearings Boards unless they are found in the County's Comprehensive Plan or Development Regulations. RCW 36.70A.280(a). The Board looks at the development regulations developed by the County for review of the applications for non-agricultural development upon agricultural lands. The County has stated on the record that it is their intent to allow only non-productive or poor agricultural soil/lands to be converted in this manner. However, nowhere does this criteria or standard exist in their Comprehensive Plan or Development Regulations. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c ORDER ON REMAND, 16th day of December 2003.

- The County needs to include in the Comprehensive Plan or in their Development Regulations, the standards and criteria for conversion from Agricultural to

recreational/cultural. The Board would then have the ability to review this action and determine its compliance with the GMA. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY*, Case No. 02-1-0012c ORDER ON REMAND, 16th day of December 2003.

- The County briefing for the Compliance hearing contained repeated assertions that the Petitioner had raised new issues, issues not dealt with in the Final Decision and Order in this case. Further, in his oral argument, the County's attorney, Lloyd Nickel, informed the Board that the ICAO had not been repealed and the County may choose to repeal Title 13 and make corrections to the original Ordinance 75-2000… Upon review of the arguments of the parties and review of the party's briefing and the determination that the ICAO, which this board found out of compliance, was not repealed or in any way modified, the Board determines the ICAO continues to be out of compliance with the Order of this Board and the GMA. The Board further finds that Title 13 is better reviewed in the case begun pursuant to the new petition, now filed under case Number 03-1-0003. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County,* EWGMHB 00-1-0016, EWGMHB, Order on Compliance, July 10, 2003.

- Upon review of Issue 12, the public participation issue, the Board finds this is not an issue this Board has jurisdiction to decide. The questions involve the design of the GMA, the burdens of proof, and the forum to address wrongs, and whether the process is too legal in form and rigid in nature. The Board is required to follow the GMA and not judge the manner it was drafted by the Legislature. *Harvard View Estates, v. Spokane County,* EWGMHB, 02-1-0005, Order on Motion, (May 31, 2002).

- The Board will not consider the question of whether the City Council's dealing with the Appearance of Fairness Doctrine is appropriate. This is not within our jurisdiction. However, the Appearance of Fairness Doctrine cannot be allowed to reduce the public participation mandated under the GMA. *Saundra Wilma and Alan D. Wilma, v. City of Colville,* EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The Comprehensive Plan Amendment changed one party's 6.5-acre plot from a residential to commercial designation. The amendment to the zoning of that area, challenged in the amended petition, implemented that Comprehensive Plan change. This is site specific. The Supreme Court of the State of Washington, in *Wenatchee Sportsmen Association v. Chelan County,* 141 Wash. 2nd 169, 4 P. 3d 123 (2000), held: "[A] site-specific rezone is not a development regulation under the GMA, and hence pursuant to RCW 36.70A.280 and .290, a GMHB does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA." *Saundra Wilma and Alan D. Wilma, v. City of Colville,* EWGMHB, 02-1-0007, Amended Final Decision and Order, (December 5, 2002).

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW 36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County,* EWGMHB 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- The Board does not have jurisdiction to review local government compliance with statutes other than the Growth Management Act and SEPA compliance on GMA plans and regulations. Similarly, the Board has no authority to impose a moratorium, to set aside permits, or to enjoin construction. RCW 36.70A.300 limits the type of relief a Board can grant to either finding a county in compliance or not in compliance with the Act. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that its jurisdiction extends only to matters specified in RCW 36.70A.280 (1). The Board lacks jurisdiction to determine whether a county violated other statutes. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The general rule is that an administrative board does not have jurisdiction to hear constitutional issues. The Board is without jurisdiction to decide constitutional issues. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- RCW 36.70A.330 does not preclude the Board from holding multiple compliance hearings. If a county, for instance, is found at a compliance hearing to be in noncompliance but takes subsequent action to come into compliance, it must have an avenue to be found in compliance. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- There is nothing in the language of RCW 36.70A.330, which suggests that the Board does not have continuing jurisdiction to determine whether a county has come into compliance at some date after an initial compliance hearing. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- When a compliance hearing results in a finding of continued noncompliance, the Board's jurisdiction is not at an end. It retains jurisdiction to determine at a later date whether compliance has been achieved and to make orders relating to the original compliance order. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

- The Board lacks jurisdiction to hear petitions regarding local service agreements under chapter 36.115 RCW. *Weaver, et al. v. Yakima County*, EWGMHB 97-1-0016, Order on Motions and Final Decision and Order (Sep. 18, 1997).

- The Board has no jurisdiction to review constitutional issues. *Weaver, et al. v. Yakima County*, EWGMHB 97-1-0016, Order on Motions and Final Decision and Order (Sep. 18, 1997).

- A Growth Management Hearings Board does not have the jurisdiction to review an action of a County pursuant to a non-GMA statute unless that statute was used to comply with the requirements of the GMA. However, the Board has jurisdiction to determine if a land use planning legislative action complies with the GMA, as long as there is a sufficient nexus between the action and the GMA. The Board's jurisdiction is not to determine whether the local government has properly enacted such law, but the effect of the law passed upon the County's compliance with the GMA.

  When we review the County's passage of an ordinance under the Washington Forest Practices Rules, WAC 222-20-050, we examine this action to determine whether the County remains in compliance with the GMA. To do otherwise would allow the myriad of other planning statutes to dramatically affect a County's Comprehensive Plan with no checks. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion to Dismiss, (9-29-99).

- The Board concluded that it has no jurisdiction to hear the issue concerning the Americans with Disabilities Act. Petitioner may have had recourse to file a petition for failure to enact a public participation program, or file a case in the proper venue for hearing issues regarding the Americans with Disability Act. The motion to dismiss this issue was granted. 00-1-0012: *Gary D. Woodmansee v. Ferry County;* Order on Motions; (Jul. 28, 2000)

- The Board found from the arguments of the Petitioner that the issue was beyond the scope of the intent of the Growth Management Act. To argue that Respondent was over-protective of private property rights in violation of RCW 36.70A.040(6), Petitioner must identify the statutes, which have been violated as a result of the alleged over-zealous protection of private property rights. The Petition fails to do that, creating a lack of specificity. The motion for dismissal was granted. 00-1-0012: *Gary D. Woodmansee v. Ferry County;* Order on Motions; (Jul. 28, 2000)

- RCW 36.70A.280(a) provides that "(a) growth management hearings board shall hear and determine only those petitions alleging ... (t) hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter." Petitioners challenge Yakima County's compliance with the GMA requirement that a county's development regulations be consistent with and implement its comprehensive plan. In assessing Petitioners' challenge to Yakima County's GMA compliance, the Board first identifies the appropriate legal standards to be applied and allocate the burden of proof. By statute, this Board applies a clearly erroneous standard, RCW 36.70A.320(3), and allocates the burden of proof to Petitioner. RCW 36.70A.320(2). A Board may find non-compliance under the clearly erroneous standard when the Board is "left with the firm and definite conviction that a mistake has been made." See, e.g., *Friends of Skagit County v. Skagit County*, WWGMHB No. 96-2-0025, 2000 WL 1175121, *5 (2000). 00-1-0009: *Beatrice M. Bertelsen, et al. v. Yakima County, et al.*; Final Decision and Order; (Nov. 2, 2000)

- The Board found that the amendment to the City's zoning was part of the process of moving towards compliance with the GMA and the adoption of a Comprehensive Plan. After the passage of the 1997 deadline for completion of their plan, we must presume all land-use planning by the City was part of the effort to come into compliance with the requirements of the GMA. The Board has jurisdiction to hear the Petition. 99-1-0014; *Latah Creek*

Neighborhood Council v. City of Spokane, et al.; Order on Motion for Dismissal of Petition; (February 24,2000).

- The Board's original Order in this matter concluded that after the passage of the 1997 deadline for completion of their Plan, we must presume all land-use planning by the City was part of the effort to come into compliance with the requirements of the GMA. The Intervenor/Respondent's motion for reconsideration persuaded the Board that there remains a material question of fact that must be resolved: whether this amendment of the Zone Code was part of the process of moving into compliance with the GMA. As in a summary judgment under Cr 56, if there is a question of fact, the Board will not dismiss the Petition but will resolve the factual issue at the time of the final hearing. 99-1-0014; *Latah Creek Neighborhood Council v. City of Spokane, et al*.; Order on Motion to Reconsider; (March 20, 2000).

- RCW 58.17.060 requires the County to adopt regulations for the summary approval of short plats and short subdivisions or alteration or vacation thereof. "Such regulations shall be adopted by ordinance and shall provide that a short plat and short subdivision may be approved only if written findings that are appropriate, as provided in RCW 58.17.110, are made by the administrative personnel…." (RCW 58.17.060(1). This clearly requires that the ordinance contain a requirement of written findings. The ordinances' reference to RCW 58.17.110(6) is not enough. That ordinance section only requires that "appropriate provisions are made within the proposed subdivision for the public health, safety and general welfare, as per Chapter 58.17.110 RCW." The County has failed to comply with RCW 58.17.060 by failing to include within Title 4 the requirement of written findings. However, this board does not have the jurisdiction to find non-compliance if the County has not followed these RCW provisions. The Board can only determine if the actions of the County comply with the GMA. Furthermore, the Board has already found these Titles 4 and 5 out of compliance. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Jurisdiction - (60 days)

- The final noncompliant change made by the city is the apparent reduction of the period of filing an appeal to 21 days. (17.108.130(J)). To the extent that such section requires a petition to be filed before the Growth Management Hearings Board earlier than the statutory 60 days, the provision is non-compliant.

  > (2) All petitions relating to whether or not an adopted comprehensive plan, development regulations, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter… must be filed within sixty days after publication by the legislative bodies of the county or city. (RCW 36.70A.290(2)).

  The limitation of the filing of an appeal before the Growth Management Hearings Board to 21 days is out of compliance with the GMA. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- The County contends the key issue before this Board is the Ferry County Planning Department's determination of non-significance, published more than 60 days prior to the filing of the Petition by the Petitioners.

The Petitioners contend the issue before the Board is the effects of the Timber Forest Protection Ordinance (TFPO), notice of which was published within 60 days of filing of the Petition. Because the issue before the Board is the effect of the TFPO on Ferry County's Comprehensive Plan and Development Regulations, and not the question of the proper enactment of the Ordinance under the Timber and Forest Practices Regulations. The Petitioners filed their petition within the time provided by statute. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion to Dismiss, (9-29-99).

- Pursuant to WAC 242-02-220, a petition for review must be filed within 60 days of publication of notice of adoption of the county ordinance. The sixtieth day fell upon a national holiday and therefore the following day or January 18 became the 60th day. 00-1-0003: *Gary D. Woodmansee v. Ferry County*; Order of Dismissal; (Feb. 8, 2000).

- The Growth Management Act clearly requires publication after the adoption of the comprehensive plan or development regulations, or amendment thereto. RCW 36.70A.290(2)(b). There is no requirement for publication of the County's review of the Ferry County Critical Areas Ordinance and the County's Comprehensive Plan. Had the County amended the CP or its regulations, the result would be different. The publication that did take place was not at the request of the County and is not the date at which we calculate the 60-days. The effective date of the action taken, and the start of the 60-day clock for filing a petition for review, is February 5, 2001, the day the legislative action was taken. The petition in this matter was filed on April 12, 2001, beyond the 60 day allotted time. 01-1-0008: Concerned Friends of Ferry County, et. al. v. Ferry County; Order of Dismissal; (Jun. 8, 2001).

Limited Areas of More Intensive Rural Development-LAMIRDs or RAIDs

- There are three types of LAMIRDS allowed under RCW 36.70A.070(5)(d)(i), (ii) and (iii). For simplicity, they will be referred to as Type I, II or III. In our previous orders we have referred to these as RAIDS. The Board now wishes to refer to these as LAMIRDS, as the Central and Western Hearings Boards have done. The previous acronym, RAIDS (Rural Areas of Intensive Development), left out the letters "L" and "M". The letter "L" which is for the word "limited" in "Limited Areas of More Intensive Rural Development" is a key part of this exception to rural development. James *A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The GMA's key goal has been to direct urban development into urban growth areas and to protect the rural area from sprawl. In 1997 the State Legislature amended the GMA to make accommodation for "infill, development or redevelopment" of "existing" areas of "more intensive rural development," however such a pattern of growth must be "minimized" and "contained" within a "logical outer boundary." This cautionary and restrictive language evidences a continuing legislative intent to protect rural areas from low-density sprawl. James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of (c)(ii) (visual compatibility) and (iii) (reduce low-density development) do not apply to those LAMIRDS designated under (d)(i). This section does not allow increased low-density development, but merely removes the reduction requirement. The logical outer boundary (LOB) provisions of (d)(iv) apply only to LAMIRDS designated under (d)(i) (Type

I). Type II and III both allow "new development" and "intensification of development." Type I LAMIRDS do not allow "new development" except as it may be part of "infill, development, or redevelopment." . James *A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- Type I LAMIRDS consist of certain "existing areas" defined in RCW 36.70A. 070(5)(d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas "whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." An "industrial area" is not required to be principally designed to serve the "existing and projected rural population." Thus, all other Type I LAMIRDS (commercial, residential, or mixed-use) must be principally designed to serve the "existing and projected rural population." In designating and establishing LAMIRDS under Type I a county must "minimize and contain" ((d)(iv)) the existing area or existing use. A prohibition against including lands within the LOB that allows a "new pattern of low-density sprawl" for the existing area or existing use must be adopted ((d)(iv)). Type I LAMIRDS, being neither rural nor urban, allowing existing areas or existing uses, must always be "limited" i.e., minimized and contained. James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- In establishing the LOB for an "existing area" (but not for existing uses) under RCW 36.70A.070(5)(d)(iv) a county is required to "clearly" identify and contain the LOB. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. We agree with the Western Growth Board and conclude that legislative intent, as determined from reading all parts of the GMA with particular emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1991. (*City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, FDO, February 6, 2001.) *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of RCW 36.70A.070(5) (d)(v) (existing area or existing use as of July 1, 1990) apply to all LAMIRDS whether designed under (d)(i) (ii), or (iii). Thus, for any "intensification" allowed under Type II or Type III the designated use or area must have been in existence on July 1, 1990 (or later date under the provisions of (5)(B) or (C)). This restriction does not apply to "new development" authorized under Type II or Type III. Anytime the phrase "existing" is used to define an area or use, the provisions of RCW 36.70A.070(5) (v) (7-1-90 or as here, 7-91) modify that phrase. *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- Under Type II, small-scale recreation or small-scale tourist LAMIRDS are authorized. Commercial facilities to serve those LAMIRDS are allowed. The intensification or creation of small-scale recreational or small-scale tourist uses must rely on a rural location and setting. Such LAMIRDS cannot include new residential development. The uses need not be principally designed to serve the "existing and projected rural population." "Public services and public facilities" must be limited to those "necessary to serve" only the LAMIRD. Such public services and public facilities must be provided "in a manner that does not permit low-density sprawl." *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The LAMIRDS allowed under Type III authorize intensification or creation of "isolated cottage industries and isolated small-scale businesses." These need not be principally designed to serve the "existing and projected rural population" and non-residential uses. They must provide job opportunities for rural residents. Public services and public facilities have the same constraints as those provided under Type II.

  The allowance of small-scale recreational and small-scale tourist uses, isolated cottage industries and isolated small-scale businesses are also subject to the provisions of RCW 36.70A.070(5)(a), (b), and (c), as well as the definitions contained in RCW 36.70A.030(14) and (15). *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The County designated 37 LAMIRDS as combinations of Type I, II and II. The County did not separate them and the Board must believe the County intends all three types to be included in each LAMIRD. The County contends the GMA does not require each LAMIRD be segregated into a separate designation as a Type I, II or III. They further cite a Western Board decision, *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, as supporting this contention. This is not correct. The GMA identifies three types of Limited Areas of More Intensive Rural Development. The County must chose which LAMIRD is appropriate for the specific site. To hold otherwise would be to ignore the law and the cases that interpret the law. . *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The statute, RCW 36.70A.070 (5)(d) is the best place to start to find that the GMA established three separate LAMIRDS. The Statute talks of the rural element to "allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:"

  The argument that there are three separate types of LAMIRDS is clearly supported when you examine the three paragraphs that are set apart, listing the type of LAMIRD and the limitations for each type. To have all three types in the same space without boundaries between them would not only be confusing but virtually impossible. Type I is a mixed-use area that can have residential development infill. This must be bound by logical outer boundaries delineated predominately by the built environment. The same case cited by the County, *Skagit, Supra*, asserts that these limitations, RCW 36.70A. 070(5)(d)(iv), do not apply to Types II and III. Further, Types II and III can have new development, isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population contrary to Type I. Also Types II and III do not allow residential development. *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The County cited dictum found in *City of Anacortes v. Skagit County,* Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precedent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County*, WWGMHB No. 96-2-0023c, Compliance Order, August, 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *James A. Whitaker v. Grant County,* EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997. The Legislature amended RCW 36.70A.030, adding a new subsection, which provides: RCW 36.70A.030(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Legislature at the same time amended RCW 36.70A.070, which clarified the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions, more intense rural development would constitute an impermissible pattern of urban growth in the rural area. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (iii), (iv), and RCW 36.70A.110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for a UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that, even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. RCW 36.70A.070(5)(d)(iii). Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- While the Board recognizes that RCW 36.70A.070(5) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County argued that its decision to establish RAIDs is justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." However the County provides no written record of the local circumstances identified. The quote referred to by the County in their brief, speaks of the Blalock area being characterized by land uses which include small-scale farms, single-family homes, limited commercial uses and open space. Very little more is found that might

relate to the creation of the boundaries of the RAID and what is included therein. The County has failed to properly limit the area of the RAID. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- If the County used local circumstances to guide them in the development of the rural element, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). The County has made no attempt to explain in writing how the rural element harmonizes the planning goals. Absent the Act's mandated written explanation, the County has not complied with RCW 36.70A.070(5)(a). Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Further the County failed to give this Board any clear statement of the area existing at the time Walla Walla County opted into the GMA, October 30,1990. It is this date that is to be used to limit the boundaries of a RAID. The Findings of Fact adopted by the County contain no analysis of areas existing in the Blalock region by actual lot sizes due to common ownership of adjacent platted parcels and are devoid of findings regarding uses as of October 30, 1990, relying instead solely upon historic platting and current uses to justify its "rural transition" region. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- In addition to the County's failure to follow the steps found in the GMA for the designation of Rural Areas of More Intensive Development (RAID), the Board finds that the County erred due to the RAID's proximity to the City of Walla Walla. The Blalock area is up against the UGAs of both the City of Walla Walla and College Place. The 1997 Legislative amendment allowing RAIDS was clearly done to let the county do something with unincorporated concentrations of urban-like growth apart from existing cities. However, RCW 36.70A.110(3) provides that Urban Growth Areas should be first located in areas already characterized by urban growth that have adequate existing public facilities and service capacities to serve such development. Second, UGAs should include areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Here, Walla Walla County did not include the Blalock Orchards area within the City of Walla Walla's UGA. Instead, the County chose to place Blalock Orchard in a RAID up against the City of Walla Walla's UGA. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Because the County has not followed the GMA requirements for a RAID, has not developed a written record explaining how the rural element harmonizes the planning goals in the

GMA, has not adequately shown this Board data in the record of how the 1990 boundaries of the developed area were determined and have located this RAID virtually up against the City's UGA, the Board is compelled to find the Rural Transition zone out of compliance. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Board finds that the Blalock Orchards Rural Transition zone as presently configured, constitutes an impermissible pattern of urban growth in a rural area. The Board determines this designation does not satisfy the exception to the prohibition of urban growth in rural areas provided by RCW 36.70A.070(5)(d). In addition, the County has failed to explain in writing how the Rural Transition zone harmonizes the planning goals of the GMA as required by RCW 36.70A.070(5)(a). *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- If the language was chosen before the statute was changed and we must look at what the parties meant at the time the language was drafted. However, the language found in Grant County's CPP 2B is different and speaks of "urban densities". The Committee adopting the CPPs has stated this prohibition two different ways. One way might be technically challenged and said to not prohibit RAIDs, but not so with 2B. It was clear the Countywide Planning Policies intended to prohibit urban densities outside urban growth areas and the later amendment of the GMA does not change this conclusion. 99-1-0019; *James A. Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000)

- In a May 23 2000 FDO the Board found the County RAIDs are out of compliance with the GMA because they violate the CPPs. This remains true. The County also was found to not have developed "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). This still needs to be done. The written "Policy Plan" pointed to by the County does define the planning concepts and principles embodied in the Plan, but it was not what the GMA was seeking in this case. The requirement for a written record was added at the same time the option for RAIDs were given to the County. The Board finds the Legislature was seeking a written statement of how the Raids harmonize with the goals of the GMA. The County has not done this. 99-1-0019; *James A. Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; City of *Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration;(Aug. 7, 2000).(Upheld, Thurston Co. #00-2-01622-8).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new subsection allowing RAIDs Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. 99-1-0019; James *A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000). 99-1-0016: *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. 99-1-0019: *James A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000). 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

  RCW 36.70A.070(5)(d)(ii) applies to development that does "not include new residential development." The RAID designation clearly does not preclude new residential development (indeed, it permits it as a matter of right); thus, (5)(d)(ii) cannot be invoked by the County here – it does not apply. 99-1-0019; James *A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000)

- RAIDs are justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." When considering local circumstances, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). 99-1-0019; *James A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant Cou*nty; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

- The fact that the GMA was amended, thus allowing the designation of RAIDs by the County does not change the mandatory nature of the CPPs. The County did not have to create the RAIDs. They were allowed to do so. If they wished to do so, the County had the option of requesting a change in the CPPs. This would give the local jurisdictions input, coordinate the

plans as required by the GMA and make the change if desirable. This was not done. The Raids are contrary to directives of the County's CPPs. 99-1-0019: *James A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant County;* Order on Respondent's Motion For Reconsideration;(Aug. 7, 2000).

RCW 36.70A.070(5)(d) does not prohibit the development of undeveloped lands within RADs, under certain conditions. We find that the conditions established in the Curlew Lake Sub-Area Plan fall within the limits found in RCW 36.70A(5)(d)(iv). 95-1-0010 *Woodmansee and Concerned Friends of Ferry Co. v. Ferry County;* Order on Remand (October 24, 2000).

Maps

- RCW 36.70A.070 includes the following language:

> "The comprehensive plan of a county or city that is required or choose to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be internally consistent document and all elements shall be consistent with the future land use map."
>
> The GMA provides no further guidance on what that map must include. The Central Puget Sound Board, in Bremerton/Port Gamble, held "the land use map does not comply with RCW 36.70A.110(6) and the County will be directed to depict the revised UGAs on a new land use map and, on that map, reference the location of maps of appropriate scale to discern the actual location of the UGA boundaries."

The Growth Management Act requires a map or maps depicting land uses contemplated in the comprehensive plan. It can be assumed that the scale of the map must be sufficient to be useful for decision-making regarding specific parcels of property. 00-1-0007: *Gary D. Woodmansee v. Ferry County;* Final Decision and Order; (Aug. 18, 2000)

In a perfect world, a landowner could look at a map and determine all the classifications, and therefore, regulations, which apply to his land. Ferry County Resolution 96-20 anticipated that Ferry County would develop a map including, but not limited to:

1. Urban Growth Areas
2. Rural Lands
3. Agricultural Lands
4. Forest Lands
5. Mineral Lands
6. Wetlands
7. Fish and Wildlife Areas
8. Geological Hazards Areas
9. Flood Hazard Areas
10. Shoreline Designations
11. Aquifer Recharge Areas

- The Board recognized in *CFFC v. Ferry County* (97-1-0018) that existing maps were not adequate for designating wetlands and that a process in addition to the maps was necessary and appropriate for adequate designation. In that case, the County corrected the deficiency by providing for on-site visits to verify the existence of wetlands. However, here, the process depends upon the landowner's cooperation. The voluntary disclosure by the landowner of existing wetlands is inadequate without a site inspection or other enforcement provisions. An individual might not have the expertise or desire to identify wetland and such voluntary disclosure provides inadequate protection.

  Voluntary disclosure of the presence of wetlands is inadequate for compliance with the requirements for identification and protection of wetlands. Conceivably, penalties in an enforcement section for failure to disclose the presence of a wetland may be adequate to ensure such disclosure. If the penalty is non-existent or inadequate, the County must provide for a different mechanism, such as on-site inspection before permit issuance, to ensure the protection of wetlands. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Final Decision and Order, July 13, 2001.

Master Planned Resorts (MPRs)

- The State Legislature provided a specific exception, which allows new urban growth in the form of a Master Planned Resort (MPR) to exist outside Urban Growth Areas, if certain requirements are met. The MPRs are to be self- contained and not be the catalyst for further urban sprawl. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The GMA use of the phrase "self contained" does not require a MPR to contain everything it or the visitors need. This would be virtually impossible and would be too strict an interpretation of the language. The better interpretation would require the MPR to have sufficient services and needed places to shop for common needs to be met and avoid an adverse impact upon the neighboring urban areas. The visitors and residences at the MPR should be able to meet their daily needs without being forced to go elsewhere. The fact others might shop there or visit does not put the County in violation of the "self contained" section of the Act. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Act does not require the MPR to be any specific distance from UGAs, not 5 miles or 100 feet. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Comprehensive Plan is where the MPR "policy" for the County is formulated. These policies serve little purpose unless there are development regulations to implement them. There is no specific statute that requires development regulations be written for MPRs, yet the County cannot proceed to permit MPRs without such regulations. Kittitas County has chosen to implement the MPR Policies by adopting a Zoning Code Amendment: Master Planned Resort Zone and a Master Planned Resort Subarea Plan. While these do not have many detailed regulations guiding siting of a MPR, a permitting procedure is developed. The specific details of each Resort are "hammered out" in the Development Agreements provided for in KCC 15A.11, Development Agreements, and RCW 36.70B.170 - .210. 00-1-0017: *Ridge v. Kittitas County, et. al*.; Final Decision and Order; (Jun. 7, 2001)

- RCW 36.70A.360(1) defines a MPR as a type of "planned unit development." The County has a zoning ordinance for planned unit developments, KCC 17.08.445. A process is established therein for the assessment of a PUD application. Instead of using this process for siting a MPR, the County established a Subarea Plan and a MPR Zoning District, which includes the process for establishing a MPR. A MPR cannot be zoned under both the MPR Zoning District and the PUD provisions. Both are separate and distinct zoning districts under the Kittitas County Code. 00-1-0017: Ridge v. Kittitas County, et. al.; Final Decision and Order; (Jun. 7, 2001).

- The phrase "Planned Unit Development" is "a generic term for a regulatory technique which allows a developer to be excused from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations. The technique is characterized by flexibility." *Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 775-76, 942 P.2d 1096 (1997). A PUD is a type of property development intended "to achieve flexibility by permitting specific modifications of the customary zoning standards as applied to a particular parcel of land." *Barrie v. Kitsap Cy.*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1975).

- The MPR statute pointed to as requiring permitting only through the PUD process does not appear to the Board as requiring such a limited interpretation. RCW 36.70A.360(1). The cited phrase rather describes the type of zoning treatment. How the County establishes the permitting process is relevant only in that it must assure that the GMA and MPR policies are complied with. 00-1-0017: Ridge v. Kittitas County, et. al.; Final Decision and Order; (Jun. 7, 2001). Affirmed, Yakima Superior Court, #00-1-02761-2, May 29,2001.

Mediation

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of mediation services." City of Spokane v. Spokane County and City of Airway Heights, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

Mineral Resource Lands

- The Board might not necessarily agree with the result the County reached when it designated the SRP site as Low Density Residential, yet the Board must presume the validity of the County's actions. The legislature has made it increasingly clear that the County should be given more deference in making GMA decisions. The decision-making in this case is the responsibility of the County, and the Board's function is to ensure that the County follows the law. The Board now finds the County did in-fact uniformly apply their criteria and shown their work. The Board is satisfied the Respondent has adequately analyzed the other mining sites in Spokane County and has treated them consistently with the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County, EWGMHB*, 02-1-0003, Final Order on Compliance, (April 14, 2003).

- While the GMA requires the County to designate and conserve mineral resource lands, the Petitioner has the burden of demonstrating that any action taken by the County is not in compliance with the Act. The Board is required to find compliance with the Act, unless it determines that the County's action is clearly erroneous in view of the entire record before

the Board and in light of the goals and requirements of the GMA. *Spokane Rock Products, Inc. v. Spokane County, EWGMHB,* 02-1-0003, Final Order on Compliance, (April 14, 2003).

- Counties that are required to plan under the GMA must identify and conserve mineral resource lands. RCW 36.70A.060(1). In its July 19, 2002, Final Decision and Order the Board found Spokane County failed to uniformly apply their mineral resource lands designation criteria. The Board further found the County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County, EWGMHB,* 02-1-0003, Final Order on Compliance, (April 14, 2003).

- Under GMA, each county is required to assure the conservation of mineral resource lands. RCW. § 36.70A.060(1) (Supp. 2001). The development regulations adopted to implement the comprehensive plan "…**shall assure that the use of lands adjacent to**… **mineral resource lands shall not interfere with the continued use, in the accustomed manner** and in accordance with the best management practices, of these designated lands…for the extraction of minerals." RCW. § 36.70A.060(1) (Supp. 2001) (emphasis added). *Spokane Rock Products, Inc. v. Spokane County, EWGMHB,* 02-1-0003, Final Decision and Order, (July 19, 2002).

- The Growth Management Act "…places a high priority on the conservation and protection of resource lands." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 8 (July 28, 1994). One critical reason for this fact is that mineral resource lands are non-renewable resources. Mineral lands "…cannot be re-created if they are lost to urban development or mismanaged." (See Comprehensive Plan, at NR-1). In addition, "…mineral resources are site-specific and not subject to relocation." (See Comprehensive Plan, at NR-11). The location of these resources is critical the economic viability of mining operations. (See e.g. Comprehensive Plan, at NR 2 ("Mineral resources must meet criteria of quality, quantity, and accessibility for commercial viability. Location of mineral resources is important, since the cost of transporting them adds greatly to cost."). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The Spokane County Comprehensive Plan incorporates the GMA mandate for the protection of mineral lands. Thus, a primary objective of the Comprehensive Plan is to avoid the irrevocable loss of natural resource lands by protecting them for future generations. (See Comprehensive Plan, at NR-1)

> In the past, urban development, especially in the Spokane River Valley, covered both high-quality agricultural land and large deposits of quality sands and gravels. Due to the urbanization, it is unlikely that these resources will be available for future generations. **Designating and protecting the County's remaining resource lands ensures that these remaining areas will not be lost to incompatible development**.

(Emphasis added). The County recognized, in adopting mapping designations (among other matters), that the greatest threat to natural resource conservation was encroaching urbanization. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The Board finds that the preservation and protection of known mineral resource lands is a primary objective of the Growth Management Act. Both the GMA and the adopted Comprehensive Plan mandate the protection of known and valuable mineral resources. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- To assist cities and counties in the designation of mineral lands pursuant to section 36.70A.170, the GMA required the department of community, trade, and economic development to adopt specific guidelines. RCW. § 36.70A.050(1) & (3) (1991). Those guidelines have been adopted and promulgated under WAC 365-190-010 ET seq. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The minimum guidelines recognize the importance of designating natural resource land to assure their long-term conservation. WAC. § 365-190-020. Counties are required to identify and classify aggregate and mineral resource lands from which the extraction of minerals occurs, or can be anticipated, to insure future supply of aggregate and mineral resource material. WAC. § 365-190-070(1). Areas must be classified as mineral resource lands based on geologic, environment, and economic factors, existing land uses, and land ownership. WAC. § 365-190-070(2). Counties should classify lands with long-term commercial significance for extracting at least the following minerals: sand, gravel and valuable metallic substances. WAC. § 365-190-070(2)(a). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The County argued that designating the site as mineral lands was not compatible with the surrounding residential uses. However, we agree with Petitioner that physical proximity of resource land to population areas "in and of itself, does not preclude designation." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 5 (1994).

  This Board has recognized the GMA calls for the protection of natural resources from urban development, not the other way around. Thus, in Ridge, we concluded: "The Board notes that RCW 36.70A.060 requires that resource lands be protected or 'buffered' from the influence of adjacent property, the opposite of the County's approach." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 7 (1994).

  To the extent that there is tension between the natural resource policies and those concerning urban uses, there must be an attempt to harmonize those competing interests. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, at 6 (July 6, 1994). The County is obligated to give effect to each of the goals to the extent possible. Id. In addition, "[t]he overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 8 (1994). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The County asserts that effective mitigation of the impacts of the Petitioner's mining operation would be difficult or impossible. The Board rejects this claim. The Board notes that there is nothing in the record to support the claim that mitigation cannot be achieved. Further, there was no evidence presented by the County to establish that inability to mitigate

was a basis for the decision to designate the SRP site as low density residential. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The Board finds that the County failed to uniformly apply the designation criteria. The criteria were not applied equally with other mining sites nearby, including the County's own site, which was designated as a mining site. The Board concludes that County is out of compliance due to the manner in which it applied the criteria for the designation of mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the SRP site. Specifically, the Board finds that the County's criterion was not properly applied in denying the designation of the SRP site as mineral resource land. The County has not "shown its work" regarding application of the criteria to the SRP site or to other nearby sites which did receive designation as mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- While a mineral lands designation may make reclamation of the site more practical, we find nothing in the GMA that would require the County to take that into consideration in its action. The Petitioner has not overcome the presumption of validity and has not carried its burden of proof on this issue. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- The thrust of the county's resolution regulating policies is to protect adjacent lands from the mineral resource lands. The Act requires the opposite, protection of the resource lands from encroachment from adjacent uses. Additionally, if the county chooses to rely on other ordinances to meet this requirement, they must be specifically referenced in the resolution. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The Growth Management Act does not prohibit a county from permitting rezone applications, which could allow the extraction of mineral resources in rural areas. The rezone application would be subject to the county hearing process to determine compliance with all applicable zoning regulations and state law. *Salnick, et al. v. Spokane County*, EWGMHB 97-1-0020, Final Decision and Order (Mar. 25, 1998).

- While the Board believes the intent and spirit of the Growth Management Act is to designate where appropriate, all lands that have "long-term significance for the extraction of minerals" and have in place development regulations to protect those resource lands, we also believe the Respondent City has acted when it decides not to designate such lands. This matter is before us on a "Failure to Act" Petition. The Board may not agree with what the City of Richland has done, but the record shows they went through an extensive process and made a decision to not designate any lands as mineral resource lands.

  We recognize the concerns of the Petitioners and the dissenting opinion, however, because the legal question before us is a failure to act, we must find in favor of the City. The question of whether that GMA was correct is not before us at this time. *Saddle Mountain Minerals,*

L.L.C. and Gary Maughan, v. City of Richland, **(City of Richland)**, EWGMHB Case No. 97-1-0022, Final Decision and Order, (10-1-99).

- RCW 36.70A.060(1) in part states "…or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or minerals resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration."

  The question was whether the notice was adequate and the county has met those criteria? The Ordinances require the specific notice be affixed on plats or permits "within or near" resource lands. The Growth Management Act requires that this notice be affixed on plats and permits, which affect lands on or within 500 feet of resource lands. The statute would prevail and the County Administrator dealing with these plats and permits must consider "within or near" the same as "on or within 500 feet of" resource lands. The Ordinances allow for this to happen. While having the "500 feet" in the ordinances would have been preferable, the County's wording was not a violation of the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Jul. 6, 2000).

- The GMA requires the County to designate "mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals." RCW 36.70A.170(1)(c). In making these designations, the County was to follow, at a minimum, the CTED guidelines as published in WAC 365-190. In those regulations, CTED notes that "there is no specific requirement for inventorying or mapping" natural resource lands, but that maps are a practical way to let the community know where those lands are. WAC 365-190-040(d). Upon adoption of a Comprehensive Plan, CTED notes that the GMA requires counties to "evaluate their designations and development regulations to assure they are consistent with and implement the Comprehensive Plan." WAC 365-190-040(f). The CTED regulations are guidelines, not substantive standards. 99-1-0015; Saddle *Mountain Minerals, L.L.C., et al.v. Grant County;* Final Decision and Order; (May 24, 2000).

- According to the CTED guidelines, mineral resource lands are "lands primarily devoted to the extraction of minerals or that have known or potential long-term commercial significance for the extraction of minerals." WAC 365-190-030(14).

  There is a specific CTED guideline for classifying and designating mineral resource lands, WAC 365-190-070. This guideline controls over more general CTED guidelines. Mineral resource lands are to be classified based on "geologic, environmental, and economic factors, existing land uses, and land ownership." WAC 365-190-070(2). CTED also recommends, "in classifying these areas, counties and cities should consider maps and information on location and extent of mineral deposits provided by the Washington state department of natural resources and the United States Bureau of Mines." WAC 365-190-070(2)(b). 99-1-0015; Saddle *Mountain Minerals, L.L.C., et al.v. Grant County*; Final Decision and Order; (May 24, 2000)

Minimum Guidelines

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate

additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- To aid in designating natural resource lands, the Act directs that the county give consideration to WAC 365-190, the Minimum Guidelines to Classify Agricultural, Forest, Mineral Lands and Critical Areas. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The Minimum Guidelines adopted by CTED are advisory rather than mandatory. *Easy, et al. v. Spokane County*, EWGMHB 96-1-0016, Final Decision and Order (Apr. 10, 1997).

Motions

- This Board does not grant a Dispositive motion of summary nature unless the motion relates directly to the legal issues set forth and have the potential to be resolved by the Board prior to the Hearing on the Merits. That is not the case here. The Intervenor asks for three issues to be dismissed, each of which do not deal just with joint planning and seek an advisory opinion.

- The Board finds after reviewing the briefs and hearing oral argument, these issues should proceed to the final Hearing on the Merits. There remain genuine issues as to material facts and the moving party is not entitled to a judgment as a matter of law. The Motion to Dismiss is denied. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Motion Order, (March 26, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- Respondent's second motion seeks the dismissal of Petitioners' Issue No. 5, Petitioners' request for a finding of Invalidity. The Respondent contends this issue has been addressed in our previous cases Walla Walla, Nos. 01-1-0014cz and 01-1-0015c. As above, Petitioners argue that subsequent events may have changed the facts surrounding the Boards earlier decision to not declare the Comprehensive Plan invalid. The Board recognizes that there are

unresolved material facts and will hear arguments on the question of invalidity at the Hearing on the Merits. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- While the Board fully expects all parties to comply with the deadlines in the Prehearing order, they are not "drop dead" dates for which noncompliance is fatal. The late filing did not injure the Petitioner. 00-1-0006: *Gary D. Woodmansee v. Ferry County*; Order on Motions; (Jul. 31, 2000)

- The Board holds that there are five prerequisite conditions that must be met before it will consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be preserved. Second, all the parties must jointly make the motion. Third, granting the motion will not bar or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may terminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB 95-1-0007, Motion Order Granting Continuance (Jan.18, 1996).

Natural Resource Lands

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The second edition of the Random House Dictionary of the English Language defines "conservation" as 1) "the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion." Thus, conservation prevents the loss or degradation of the resource. Using this definition, we hold "conservation" as used in RCW36.70A.060 is intended to maintain agricultural and forest resource lands. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- There are three factors for determination of "long-term commercial significance": (1) the growing capacity and productivity of the land, (2) the land's proximity to population areas, and (3) the possibility of more intense uses of the land. These criteria are not independent and must be evaluated in relation to each other. That these factors must be "considered with" each other necessarily requires the consideration of the relative significance of each factor. Physical proximity to population areas, in and of itself, does not preclude designation. The Growth Management Act places a high priority on conserving resource lands and reducing sprawl. Designation of resource lands was the first required task. Indeed, forestlands of long-term commercial significance may be located within urban growth areas in certain circumstances. There must be good faith consideration and showing that the effects of proximity to population areas are significant and unduly burdensome to avoid designation. Similarly, consideration of the possibilities of more intense use of the land must be based in real possibilities, sufficiently quantified to be considered in good faith. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- Planning options are retained by initial designation of resource lands. In order to fulfill the Growth Management Act's mandate to conserve resource lands, the initial designation should err on the side of inclusion. As more information is developed, a county can easily make changes at the comprehensive plan stage – this is the logical place for a weighting of the competing goals of the Act. Further, nothing in the Act limits a county's authority to amend its ordinance as conditions warrant. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- RCW 36.70A.170 mandates the designation of resource lands and critical areas by September 1, 1991. RCW 36.70A.060 mandates adoption of development regulations by September 1, 1991 to assure the conservation of agricultural, forest and mineral resource lands designated. No "deferral process" is recognized or authorized under GMA. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- The Growth Management Act requires those jurisdictions planning under the Act to encourage citizen participation and involvement in the process. Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." No similar standard is given for the designation of agricultural, forest, mineral resource lands, or critical areas as required in RCW 36.70A.170. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- To protect the health of the agricultural, forest, and mineral resource industries, the Growth Management Act requires protection of natural resource lands. This is accomplished through identification and "designation" of these lands in RCW 36.70A.170 coupled with their protection through the adoption of development regulations pursuant to RCW 36.70A.060. The required level of protection is compromised if either insufficient lands are designated or if development regulations fail to adequately protect these lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- The overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Critical area designations as well as resource land designations are an important first step in the planning process. They provide the sideboards for further comprehensive plan development by pointing out either where development should not occur or where, at the least, there are significant developmental concerns. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The designation and conservation of resource lands, including agricultural lands of long-term commercial significance, attempts to maintain and enhance the natural resource industries. The Act recognizes that these are important segments of our overall economy and that indiscriminate development of resource lands places burdens on these industries. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- An interim designation is made to protect the resource. It recognizes that once resource lands are lost through inappropriate development, it is difficult, if not impossible to reverse the loss. At the comprehensive plan level, designations are reviewed and possibly modified in the light of newly developed information and the need to successfully integrate all the components of the plan. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- RCW 36.70A.060(1) requires the County to assure conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. These provisions must also be consistent with the criteria used in the selection of the resource lands. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Final Decision and Order (Mar. 28, 1997).

- The Act requires counties to designate natural resource areas to protect agricultural uses; the cultivation of timber, and excavation of mineral resources on lands possessing long-term commercial significance for such uses. This requirement does not prohibit these same activities from occurring in rural areas. When the Act requires the designation of natural resources areas its intent is to protect those areas but not to exclude those activities from other areas. For example, a county could designate and protect large areas of agricultural land for the production of apples. That does not mean you cannot raise apples other than in those designated areas. *Salnick, et al. v. Spokane County*, EWGMHB 97-1-0020, Final Decision and Order (Mar. 25, 1998).

- When a county sees the decline of industry to their area, the question is what do we do to save or protect the specific industry, not what do we do to eliminate or exclude that industry. Once that industry is gone, it is difficult to bring it back, in the case of agricultural land, it never will come back. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

Noncompliance

- The Act indicates that compliance-hearing findings should not be treated as final. While the final decision and order of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a final decision and order. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 until an ordinance complies is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Motions for Invalidity, Motion to Strike "Motions for Invalidity," and Motion to Strike/Dismiss Respondent's "Motion to Strike" (Jan. 2, 1996).

Notice

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of Wildlife Habitat Injustice Prevention, et. al. v. City of Covington, CPSGMHB, 00-3-0012 (Order on Motions 11-16-00) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

  Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of*

Liberty Lake, a municipal corporation, v. City of Spokane Valley, A municipal corporation, EWGMHB, Case No. 03-1-0009, Order on Motions, March 23, 2004.

- Petitioners further challenge the adequacy of the notice given to the public regarding the proposed amendment. The published notice provided only a reference to a proposed comprehensive plan amendment, with no reference to expansion of a "planning area, or definition of a specific area of land involved

  .In *City of Burien v. CPSGMHB*, 53 P.3d 1028 (2002), the Court affirmed the local governments responsibility to notify the public:" In its order, the Board explained that while the requirement to consider public comment does not require elected official to agreed with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and proposed planning enactments."

  The notice provided in this instance clearly does not meet that standard. Further, in response to a question during the hearing on the merits, Airway Heights acknowledged it has not adopted a GMA public participation plan. RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments and broadly disseminate it to the public. The GMA further requires early and continuous public participation on proposed amendments of GMA plans and development regulations, RCW 36.70A.140. The failure to establish and follow a public participation plan is clearly erroneous. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on December 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (See *Cameron Woodard Homeowners Ass. V. Island County*, 02-2-0004, Order on Dispositive Motion, p. 2, 2002.)

  In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Milo and Donna Bauder v. City of Richland, a municipal corporation*, EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

- While it is true the Board did not find non-compliance for failure to require notice on plats and permits issued for development activity within 500 feet of designated resource lands, we noted in that decision that RCW 36.70A.060(1) would still be a requirement of the law. The language provided in Ordinance 2001-09 is non-specific, while the language in the ICAO, as noted by the County, is in specific contradiction to the statutory 500 feet. This contradiction must be corrected to conform to the statute. The distance is 500 feet as required by the above

statutory language. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- A post-adoption notice requires cities to publish a summary of the ordinance that includes major features or topical areas of the adopted action. The public notice by City of Yakima contained no summary of major features (e.g., description or mapping of changes and amendments); no disclosure of topical areas such as a listing of the five (5) site-specific applications that formed the basis of the annual amendments; no reference to Congdon Orchards; no reference to the date of public hearing; and no reference to the specific file and application description utilized in earlier notices. The publication simply failed to effectively advise the public or comply with statutory requirements. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Order Denying City's Motion to Dismiss, (June 18, 2002).

- It is clear from a reading of the Growth Management Act (the GMA) that the legislature intended public participation be a high priority. *Wilma et al. v. Stevens County*, EWGMHB, Case No. 99-1-0001c, Final Decision and Order (May 21, 1999). Part of Public Participation is the Notice requirements under GMA. The City is required to give notice of their action by the publishing of a copy of the ordinance or a summary of that ordinance. The "summary" published by the City would give no reader sufficient information to know what action the City has taken. The GMA requires more. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Order Denying Motion for Reconsideration, (July 15, 2002).

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on December 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (See *Cameron Woodard Homeowners Ass. V. Island County*, 02-2-0004, Order on Dispositive Motion, p. 2, 2002.)

  In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Milo and Donna Bauder v. City of Richland, a municipal corporation*, EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

- Local government has a duty to be clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. The court in *City of Burien v. Central Puget Sound Growth Management Hearing Board,* 53 P.3d 1028 (2002) set forth the general rule as follows:

  > In its order, the board explained that while the requirement to consider public comment does not require elected officials to agree with or obey such comment, **local government does have a duty to be clear and**

consistent in informing the public about the authority, scope and purpose of proposed planning enactments. (Emphasis added.)

This duty has been historically recognized by Growth Hearings Boards. *Friends of the Law v. King County,* 1994 WL 907890 (1994) (describing notice as "truth in labeling" and stating "[t]he county must also take great care to use concise, clear and unambiguous language in its notices"; *City of Burien v. City of SeaTac*, 1998 WL 472511 *6 (1998); *West Seattle Defense Fund v. City of Seattle,* 1995 WL 903147 *51 (1995) ("local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning amendments"); and *Happy Valley v. King County,* 1993 WL 839722 (1993) ("meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of the proposed planning enactments"). *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The onus is not placed on the public to decipher ambiguous or misleading notices. *Vashon-Maury v. King County,* 2000 WL 1717577 (2000) ("To place the onus on the public to find out about the hearing, as the county suggests, misplaces the duty on the citizen rather than on government"). *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The duty to provide clear and consistent information on planning enactments includes the mandate to provide "effective notice." RCW 36.70A140 ("public meetings after effective notice."). Effective notice is central to the planning process and "is a necessary and essential ingredient in the public participation process." See, e.g., *WRECO v. City of Dupont*, 1999 WL 33100212 (1999) ("it is axiomatic that without effective notice the public does not have a reasonable opportunity to participate"); and *Vashon-Maury v. King County,* 2000 WL 1717577 *6 (2000) ("the foundation for plan making is public participation"). The issuance of "effective notice" prior to public hearing is the lynchpin of the public participation process. In the absence of "effective notice," the entire process fails to meet legislative mandates for public participation and citizen-based determinations with respect to land use planning. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision,(December 5, 2002).

- The City of Yakima failed to provide the community with "effective notice" of the proposed planning enactments. The confusion was perpetuated throughout the process. Despite knowledge of the confusion regarding the proposal, no effort was made to correct the deficiencies and involve the community in this important proceeding. This cuts to the "very core" of GMA and cannot be excused as "minor errors" or "technical flaws." *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision,(December 5, 2002).

- RCW 36.70A.035(1)(a)-(e) is the beginning point for analysis of notice procedures. The City of Yakima failed to engage in an acceptable process for notice to the public of the proposed planning enactment. The municipality did not post the property; publish notice in a newspaper of general circulation; provide notice to public or private groups with interests (e.g. WSDOT - Aviation Division, general aviation pilots, West Valley Community Council, etc.); circulate the proposal to government agencies, departments or schools; or place notice in regional, neighborhood or trade journals. The City of Yakima literally did nothing to

encourage broad-based public participation in the amendment process. The notification seeking public input was solely the distribution of the notice to adjacent property owners. The Central Puget Sound Board in *Weyerhaeuser Real Estate Company (WRECO) v. City of Dupont,* 1999 WL 33100212 *8 (1999) held that the requirements of RCW 36.70A.035(1) are not satisfied by only mailing notice to adjacent property owners. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The public notice for the Congdon Orchards' land use redesignation contained no alternatives or suggestions that alternative proposals would or could be adopted in the public hearing process. The fact that the map presented was a map of current land use designations, not future proposed designations under the proposed amendment, was disclosed to the Planning Commission and the few members of the public at the public hearing. The public that was not at the hearing was never notified or provided an opportunity to comment on the corrected/clarified proposal as required by RCW 36.70A.035(2)(b). In order to avail itself of the protection of RCW 36.70A.035(2)(b)(ii), the initial notice must specifically identify alternatives under consideration. This was not done in this case. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- A fundamental change in a map amendment or consideration of a different map cannot in all fairness be characterized as "minor and technical" correction pursuant to RCW 36.70A.035(2)(b)(iii). As noted by this Board in *1000 Friends of Washington v. Spokane County,* there is no requirement that the change be "substantial." The clarifying language of the statute also recognizes that such change is appropriate (without further opportunity for review and comment) only where the clarification of the proposal is made "without changing its affect." *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- While the County is required to notify CTED and provide them copies of the Resolutions, there is no remedy provided under RCW 36.70A for failure to notify CTED 60 days prior to final adoption, except for a finding of noncompliance. *Saundra Wilma, et. al. v. Stevens County,* **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

- RCW 36.70A.106 requires the County to "notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption." Surely this implies that the County "notify" the OCD rather than believe that the OCD was "aware of the proposed amendments." While this statute does not clearly state that the ordinances must be sent to the OCD, the meaning of the section is clear. The purpose of forwarding the ordinance to the OCD is to receive comments and help in its review for compliance with the GMA. However, the statute is not clear and the Board must presume that the County's actions were valid. The failure to notify OCD is not a significant omission in view of the other shortcomings in Titles 4 and 5. 01-1-0002c; Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Official Notice

- These facts should be admitted pursuant to WAC 242-02-670(2) in that they are facts so generally and widely known to all properly informed persons as not to be subject to a

reasonable dispute. Further, this information will be of assistance to the Board in making its decision. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012, Second Motion Order, (July 29, 2002).

- On October 15, 2002, the County asked the Board to take official notice of three publications of the Department of Community, Trade and Economic Development (CTED). The three documents are: Keeping the Rural Vision: Protecting Rural Character for Rural Development, the Land Use Study Commission 1996 Annual Report, with Executive Summary and an Article entitled, "Designating areas of more intense rural development", by Keith Dearborn. These are either publications of State Government or part of the legislative history of the GMA amendments adopted by the State Legislature. The Board can take notice of these three documents. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Order on Motion to Take Official Notice, (October 18, 2002).

OFM Population Projection

- RCW 36.70A.110 requires that counties, in consultation with the cities involved, establish Interim Urban Growth Areas based upon population projections submitted to planning counties by the Office of Financial Management and distributed within the various jurisdictions of the county by means devised by the county. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The Board finds that the "based upon" language of RCW 36.70A.110 imposes an upper boundary to an Interim urban Growth Area's size for the following reasons. First, if the "based upon" language established only a "minimum," one of the underlying principles of the GMA, containment of urban sprawl, would be undermined. Second, if Counties were free to use population forecasts in excess of OFM's forecast, there would be little need for the specific appeal right granted to dispute OFM's forecast. Third, the GMA allows "new fully-contained communities" to be established outside of urban growth areas. But if a county chooses to do so, it must "reserve a portion of the twenty-year population projection and offset the urban growth area accordingly for allocation to new fully contained communities." If OFM's twenty-year population projections were just minimums, there would be no need to "offset" additional population to be housed in new fully contained communities. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The Board assumes that "population" for the purpose of the OFM's twenty-year growth management population projection means permanent or year-around population. Under this assumption, the need for recreation or vacation homes is not included in the OFM population projections. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The Board reaffirms that the size of an urban growth area should equal the area required under the OFM growth projection plus the area required to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty years. This definition allows a community to achieve its legitimate needs, while prohibiting sprawl. The Board holds that this is the meaning of RCW 36.70A.110(2). *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The inclusion of supportable land use factors grants substantial discretion to each jurisdiction designating an IUGA yet provides a yardstick that ties and constrains the designation to the OFM population forecast. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act, but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designations. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

Parties

- While the amended petition filed January 28, 2000 appears to add Mr. Robinson as a party, objection to this addition was not made by motion as directed and the Board will not consider the objection at the final hearing on the merits. However, with or without the amendment, Mr. Robinson could be allowed to participate in the hearing under RCW 36.70A.330(2), which states in part:

  A person with standing to challenge the legislation enacted in response to the Board's Final Order may participate in the hearing along with the Petitioner and the State Agency, County, and City.

  The Board recognizes David L. Robinson, as an individual petitioner in this case. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Order On Compliance; (Jan. 17, 2001)

- The Board holds that there are five prerequisite conditions that must be met before it will consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be preserved. Second, all the parties must jointly make the motion. Third, granting the motion will not bar or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may terminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other

potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB 95-1-0007, Motion Order Granting Continuance (Jan.18, 1996).

Petition for Review

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Order on Motion to Dismiss SEPA Issues, July 31, 2003.

- The final noncompliant change made by the city is the apparent reduction of the period of filing an appeal to 21 days. (17.108.130(J)). To the extent that such section requires a petition to be filed before the Growth Management Hearings Board earlier than the statutory 60 days, the provision is non-compliant.

  > (2) All petitions relating to whether or not an adopted comprehensive plan, development regulations, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter… must be filed within sixty days after publication by the legislative bodies of the county or city. (RCW 36.70A.290(2)).

  The limitation of the filing of an appeal before the Growth Management Hearings Board to 21 days is out of compliance with the GMA. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- A post-adoption notice requires cities to publish a summary of the ordinance that includes major features or topical areas of the adopted action. The public notice by City of Yakima contained no summary of major features (e.g., description or mapping of changes and amendments); no disclosure of topical areas such as a listing of the five (5) site-specific applications that formed the basis of the annual amendments; no reference to Congdon Orchards; no reference to the date of public hearing; and no reference to the specific file and application description utilized in earlier notices. The publication simply failed to effectively advise the public or comply with statutory requirements. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Order Denying City's Motion to Dismiss, (June 18, 2002).

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW

36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County*, EWGMHB 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- The question, which the Board will address, is procedural only. The Board has not been presented with sufficient arguments on the substance of existing development regulations to rule on substantive compliance. *Saddle Mountain Minerals, L.L.C. and Gary Maughan, v. City of Richland*, **(City of Richland)**, EWGMHB, Case No. 99-1-0005, Final Decision and Order, (10-1-99).

- The Petitioners must file a petition challenging a City action within 60 days after the publication of such legislative action. However, there is no statutory time limit for filing a "failure to act" petition. It is not our place to separate the issues, to decide whether part of the issue is a failure to act or compliance questions. The Petitioner must do that, and they have not done that here. Because of this, the Board must find that the time for challenge has passed. If the Petitioners are aware of an issue alleging failure to act, that can be separately considered that challenge could be brought at any time. *Bert and Gayle Bargmann and Greenfield Estates Homeowners' Assn. v. City of Ephrata*, **(Greenfield v. City of Ephrata),** EWGMHB, Case No. 99-1-0008c, Final Decision and Order, (12-22-99).

- Based on the record before it, the Board finds the change resulting from the entry of the agreed order stipulated to by the County and a party is a permanent amendment to the County's comprehensive plan and as such may be reviewed by the Board upon the filing of a petition at any time but no later than 60 days after publication by the County of such action. *Ridge, et al. v. Kittitas County*, EWGMHB 96-1-0017, Order on Motion to Vacate Dismissal of Petition for Review (Jun. 24, 1997).

- RCW 36.70A.290(2) provides in part that petitions need to be filed within 60 days after the publication of notice of adoption. At the Prehearing conference on August 23, 2000, the Board indicated they would receive any new petitions through the 60-day timeframe.

  The important date to the Petitioner is the July 20, 2000 date as they have the option of making amendments anytime within the 30 days after that date. After the 30-day time period, the Petitioners must request by motion to amend their petition. If the 60-day time period (time for filing a petition) has not passed, Petitioner has the right to withdraw the original petition and file a new petition including any issues they feel appropriate

  WAC 242-02-260(1) states: "(1) A petition for review or answer may be amended as a matter of right until thirty days after its date of file. (2) Thereafter, any amendments shall be requested in writing by motion, and will be made only after approval by a board or presiding officer. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Order on Motions, May 16, 2001.

Platted Lands

- This goes a long way to cover the information required to be contained in the maps required by the GMA. 00-1-0007: *Gary D. Woodmansee v. Ferry County*; Final Decision and Order; (Aug. 18, 2000)

- RCW 36.70A.070 requires "a map or maps" and does not detail the land use to be depicted or if it has to be developed in full by the County. Clearly, utilization of more than one map and

maps developed by other agencies, can meet the requirements of the GMA, if collectively, the maps are consistent, and internally consistent with all elements in the comprehensive plan. 00-1-0007: *Gary D. Woodmansee v. Ferry County*; Final Decision and Order; (Aug. 18, 2000)

The Board concludes that (1) more than one map may be required, (2) that maps must be of a scale to be useful for decision making regarding individual parcels of land, and (3) that maps alone may not be adequate for decision making. Upon the completion of the final critical areas ordinance and development regulations, the maps should be updated and be consistent with the Comprehensive Plan, and include all elements of the comprehensive plan and related ordinances using the best available data. 00-1-0007: *Gary D. Woodmansee v. Ferry County*; Final Decision and Order; (Aug. 18, 2000).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs,(Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". 00-1-0001: Concerned *Friends of Ferry County v. Ferry County*; Final Decision and Order;(Jul.6, 2000).

- WAC 365-195-805(1) states:

  "…In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc. "

  The words "setback" and "Buffer" may be used in different situations.

  The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County;* Final Decision and Order; (Jul. 6, 2000).

Precedent

- The County cited dictum found in *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precedent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County*,

WWGMHB No. 96-2-0023c, Compliance Order, August, 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

Presumption of Validity

- Petitioners provide no supportive argument that Ordinance 2001-09 fails to protect Geologically Hazardous areas. The Board notes Section 4.00 of Ordinance 2001-09 addresses frequently flooded areas. Petitioners have offered no argument regarding the adequacy of that section. We must presume the validity of the County's action. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

Property Rights

- Stevens County's contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the

GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

Public Facilities and Services

- RCW 36.70A.070(3)(d) provides, when planning for future growth and forecasting future capital facilities needs pursuant to RCW 36.70A.070(3)(b), the adequacy and availability of public facilities and services must be realistically evaluated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The GMA dos not require water, sewer, and other services to be in place until development occurs. We require the cities to provide these facilities and services at least concurrently with the projected growth. *Cascade Columbia Alliance v. Kittitas County*, EWGMHB 98-1-0004, Final Decision and Order (Dec. 21, 1998).

- RCW 36.70A.070(1) requires each county to "designate the general distribution and general location and extent of the uses of land, where appropriate, for…recreation…" The County was not required to develop parks and recreational areas where not necessary. Here the County believes there are sufficient recreation resources available. 99-1-0016; *City of Moses Lake v. Grant County;* Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000).

- For purposes of conducting the inventory required by RCW 36.70A.070(3)(a), "public facilities" as defined at RCW 36.70A.030(12) are synonymous with "capital facilities owned by public entities." See West Seattle Defense Fund v. City of Seattle, CPSGMHB Case No. 94-3-0016, Final Decision and Order (April 4, 1995), at 43. 99-1-0016; *City of Moses Lake v. Grant County*; Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000)

- Regarding RCW 36.70A.070(3)(c) and (d), it is recognized that if a county does not own or operate a facility, it should not be required to include the location or financing information in its Capital Facilities Element, since these decisions are beyond its authority. However, when the jurisdiction that owns and/or operates a specified capital facility cooperates with the county and discloses information pertaining to location and financing, the county should include such information in its Capital Facilities Element (per RCW 36.70A.070(3)(c) and (d)). Indeed, aside from being sound growth management and public policy, it may be a necessary prerequisite to access a new funding source - e.g., impact fees. 99-1-0016; *City of Moses Lake v. Grant County*; Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000).

Public Participation

- The GMA provides the County shall establish procedures to provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provisions for open discussion, communication programs, information services, and consideration of and response to public comments. RCW 36,70A.140. Very similar language exists in Steven County's Public Participation Policies but, to some extent, that language uses the words "may" or "should." *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County's Public Participation Policy states its purpose as: "to exceed the minimum requirements of the Growth Management Act by providing early and continuous public participation opportunities equally to all residents of Stevens County at all stages…." (Chapter 1 Purpose, Attachment 1-B).

  The County seems to be contending that all of the provisions of the Program are discretionary. The first paragraph in their PPP, stating their Policy, reads: "The Planning Department shall review all written and oral comments received and may respond to the comment in writing or verbally during the public discussion." The County's Policy's statement that the Planning Department "may" respond to the comment in writing or verbally, gives the County the choice. The County will do one or the other. To interpret otherwise would ignore the GMA and the County's own statement of purpose. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- If the County believes their frequent use of "should" results in removing mandatory requirements from their Public Participation Policy, we need only look to the dictionary to see that "should" is mandatory and not discretionary. "Should, past tense of shall. 1. Used to express duty or obligation." Webster's II, New Riverside University Dictionary. 1984. Where the GMA specifically requires (shall) the Counties to establish procedures to consider and respond to public comment, we must believe the county's language is an effort to comply. To comply, the County is required to consider and respond to public comments. If there are choices offered by the County's Program, we can only find that the County shall choose one of them. Here the County did nothing. This lack of any response cannot be the interpretation of the County's Program adopted to comply with the GMA's mandate to consider and respond to public comment. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The County's own briefing and oral argument listed what was done in response to the Petitioner's approximately 30 letters provided at different times to the County as comment. The County attorney said: "The Record shows that the County has responded to Petitioner. In at least one instance, her suggestions led to adoption of changes she requested. In most of the other instances, her public participation did not lead to results she wanted. That was the response." (Page 5, Respondent's Brief.) In this case the County did not respond other than refusing, silently, to adopt or consider the comments. This is not enough. The County, through its own Public Participation Program, is required to receive the comments of the public, consider them and respond to them. The record reflects no response to public comment, particularly to the comments of the Petitioners.

  RCW 36.70A.020(11) is one of the listed Goals of the Growth Management Act:

  > Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

  RCW 36.70A.035(2) again provides for public participation, but in the specific area of comment upon amendments to a comprehensive plan or development regulations:

  > (2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an

> amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provide before the local legislative body votes on the proposed change.

RCW 36.70A.140 is another, but more universal provision for public participation under the GMA. In that statute, the County is required to:

> …establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. . . . .

These three statutes convince us that the legislature intended that public participation enjoy a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p. 6 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The amendments discussed herein were "considered" by the BOCC after the opportunity for public review and comment had passed. An additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 6.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. A hearing, for example, is not required in all cases although it should be considered where, as here, there are major changes covering the size of buffers. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Stevens County argues that the amendments were considered before and therefore the County is exempted from holding further public hearings on the amendments. The Board declines to accept this argument. First, RCW 36.70A.035(2) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect." That is not the case here.

  Second, the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Critical Area Ordinance in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). The amendments change the size of buffers for Type one through five streams and Category two through four wetlands. These are substantial changes. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in the notices for the public hearings, or in the text of the Planning Commissions recommended Critical Areas Ordinance that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for consideration. Nor was there any notice that the county had received letters requesting changes and inviting the public to review the letters and comment on the changes being considered.

  The Board therefore finds that the changes to the CAO made at the time of final passage were not among the scope of alternatives available for public comment. The Board finds through clear and convincing evidence that the County has failed to follow its Public Participation Program and the Countywide Planning Policies and as a result is out of compliance with the GMA. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- Petitioners further challenge the adequacy of the notice given to the public regarding the proposed amendment. The published notice provided only a reference to a proposed comprehensive plan amendment, with no reference to expansion of a "planning area, or definition of a specific area of land involved.

  In *City of Burien v. CPSGMHB*, 53 P.3d 1028 (2002), the Court affirmed the local government's responsibility to notify the public:

  > "In its order, the Board explained that while the requirement to consider public comment does not require elected official to agreed with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and proposed planning enactments."

  The notice provided in this instance clearly does not meet that standard. Further, in response to a question during the hearing on the merits, Airway Heights acknowledged it has not adopted a GMA public participation plan. RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments and broadly disseminate it to the public. The GMA further requires early and continuous public participation on proposed amendments of GMA plans and development regulations, RCW 36.70A.140. The failure to establish and follow a public participation plan is clearly erroneous. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific plan and regulation changes. The City's requirement that limits the public's suggestions to general goals and policies is too restrictive. A process for

receiving both specific and general suggestions is necessary. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003)

- The City's public participation policy limits GMA participation to amendments of the comprehensive plan and/or area-wide development regulations. (Ordinance No. 1286 N.S. Section 5). This is not adequate. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- The GMA requires public participation in the adoption or amendment of the City's comprehensive plan or the development regulations, which implement the plan. The amendment of development regulations requires public participation even when it affects a specific area. The Growth Board and the GMA, however, does not become involved in project review, permitting or project specific activities that are not the adoption of or amendment of the comprehensive plan or its development regulations. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- Many of the choices the Growth Management Act places before elected officials are essentially value driven, and hearing the opinions of citizens is an important duty for elected officials. Nevertheless, the Act also obliges local elected officials to be responsive to many other duties and it therefore does not follow that a local legislative enactment will always comport with popular public opinion. The Act's purposes are served when public participation is an interactive dialogue between local government and the public. Those purposes are not served by a soliloquy. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- The City's Growth Management Act public participation policy limits public participation in amendments of development regulations to only those that are area-wide. Because of such a limit, the City is out of compliance. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- Public participation in the development, adoption and amendment of a Comprehensive Plan and its Development Regulations is critical and mandatory under the GMA. Public participation is addressed in a variety of sections of the GMA. The GMA begins with public participation as one of its goals:

  > (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. RCW 36.70A.020.
  >
  > *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- The GMA recognizes a distinction between specific project review and comprehensive land use planning. "Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions." RCW 36.70A.470(1). The Legislature intended the above provision to provide for consideration of potential amendments to a local jurisdiction's GMA plan and regulations identified or discovered during project review. *LMI v. Town of Woodway*, CPSGMHB Case

No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 10. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Order on Compliance, (August 12, 2003).

- Public participation issues may first be challenged when and if the county adopts a public participation program (PPP). Spokane County's PPP was reviewed in previous cases and found compliant. The only issue that could be now reviewed by this Board is whether the County is following their public participation program. The program itself cannot be challenged, only whether it is being followed. The Petitioner did not challenge whether the public participation was being followed. *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Order on Motion, (May 31, 2002).

- The County has developed its own Public Participation Plan and has been found compliant with the GMA. The County now is required to follow the plan. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- These three statutes convince us that the legislature intended that public participation enjoy a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p. *6 of 16 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- As we held in *1000 Friends and Neighborhood Alliance of Spokane, v. Spokane County, supra*, "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires

"early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- We agree with petitioners that "amendment," as it's used in 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, not exempted under RCW 36.70A.035(2)(b), requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations . . ." *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed change was required before adoption by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. A hearing, for example, is not required in all cases although it should be considered where, as here, there are many changes covering a wide variety of topics and geographic areas. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- Spokane County argues that the 21 textual amendments and 51 land use map amendments were not "substantial," and therefore the County is exempted from holding further public hearings on the amendments.

  The Board declines to accept this argument. First, RCW 36.70A.035(2) does not require that the amendments be significant. RCW 36.70A.035(2)(b)(iii) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect."
  Second, all of the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Comprehensive Plan in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). For example, many of the textual amendments change "shall" to "should" and "require" to "encourage." This changes mandatory policies to discretionary policies. In some cases, policies were deleted altogether.

The Board reaches a similar conclusion with respect to the 51 challenged amendments to the land use map. As Petitioners point out, just four of these map amendments re-designate over 1600 acres from the recommended Comprehensive Plan. The County asserts that the acreage involved is minimal when compared to the 1,128,832 acres within Spokane County and is therefore not a substantial change.

We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either the notices for the three public hearings, or in the text of the Planning Commissions recommended Comprehensive Plan that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for consideration. Nor was there any notice that the county had received letters requesting comprehensive plan changes and inviting the public to review the letters and comment on the changes being considered. We therefore find that the 72 challenged amendments were not among the scope of alternatives available for public comment. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- Petitioners argue they had no opportunity to comment on the changes made to the development regulations subsequent to the November 28, 2001, hearing. If, as Spokane County argues, the record was closed on December 7, 2001, the public had no opportunity to comment on certain changes made. The Petitioners, as well as all citizens, are entitled to an opportunity to comment on amendments adopted by the County. *1000 Friends of Washington v. Spokane County*, EWGMHB. 01-1-0006, Motion Order (June 7, 2002).

- Taken together, these three statutes clearly demonstrate the legislature intended that public participation be a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p. 6 of 16 (May 21, 1999). This means, at a minimum, that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of

the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- We therefore find that the changes at issue in this case were "amendments" to the Comprehensive Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- As we held in 1000 Friends and Neighborhood Alliance of Spokane, v. Spokane County *supra*, "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- We therefore find that the changes at issue in this case were "amendments" to the Comprehensive Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The GMA requires a fair opportunity for public comment before a final legislative decision is made. The County did not allow for the proper public participation required by the GMA. The public as well as the City of Spokane must have a reasonable opportunity to comment on the amendments to be considered by the County. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The City claims the County never consulted with the City of Spokane on the elimination of the UGA outside the city limits. The record reflects this fact. The Steering Committee

reviewed the City's proposal and forwarded it to the County without recommendation. Index #24. The surprise removal of the unincorporated UGA from the City's proposal and total lack of discussion of this change flies in the face of the requirements of the above statute. The clear intent of this statute is to provide for discussion, disagreement and mediation services as sought by the City. The appearance of the subject amendments at the last minute without opportunity to explore agreement or mediation is a disappointment. The County clearly failed to comply with RCW 36.70A.110(2). The Board believes that the time needed for the additional public participation will allow for appropriate opportunity to explore agreement between the City and the County. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The GMA's provisions for public participation include both a goal and a number of requirements. The *relevant* public participation sections of the GMA are found in the following: RCW 36.70A.020 Planning goals . . . Citizen participation and coordination; RCW 36.70A.140 Comprehensive plans – Ensure public participation; RCW 36.70A.035; RCW 36.70A.070; and RCW 36.70A.130. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- RCW 36.70A.140 is the primary public participation requirement section of the Act. It directs local jurisdictions to provide early and continuous public participation in the development and amendment of comprehensive land use plans and implementing development regulations. Public participation is part of the development process preceding adoption, continues after adoption through the development of amendments, and again precedes adoption of amendments. This early and continuous [*enhanced*] public participation process applies to comprehensive plans *and* development regulations, as well as, *both* the initial development and adoption *and* amendment of such plans and development regulations. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- RCW 36.70A.035 This 1997 amendatory section to the Act clarifies and emphasizes that effective notice is an essential and necessary part of the public participation requirements of the Act. It also applies to the entire GMA planning process. Effective notice precedes adoption. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- RCW 36.70A.070 This GMA section, which outlines the required elements for plans, emphasizes the importance of public participation in adopting and amending comprehensive plans. A plan cannot be adopted or amended without providing the opportunity for public participation. This section, which only addresses the requirements for contents of comprehensive plans, specifically emphasizes the application of RCW 36.70A.140 for adopting and amending comprehensive plans. This section of the Act does not apply to development regulations. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- RCW 36.70A.130, the GMA mandates that jurisdictions have a public participation program that outlines the procedures for consideration and adoption of proposed plan amendments. This process *amplifies* and *refines* the broader RCW 36.70A.140 public participation process that applies to the adoption and amendment of plans and development regulations. Providing the opportunity for public participation is a condition precedent to adoption or amendment of

a plan. Here, a special process for amending plans is required. Although this section provides exceptions to the annual concurrent review limitation, none of these exceptions are excused from public participation requirements. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The Board will not consider the question of whether the City Council's dealing with the Appearance of Fairness Doctrine is appropriate. This is not within our jurisdiction. However, the Appearance of Fairness Doctrine cannot be allowed to reduce the public participation mandated under the GMA. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The Board has already found there was no compliant public participation plan and inadequate public participation in the amendment of the Comprehensive Plan. (FDO September 4, 2002; 02-2-0007). City of Colville Resolution 13-01 is legislation that further restricts public input, i.e. $200 fee for suggested amendments. The City needs a process for the receipt of Comprehensive Plan suggestions other than through the submission of an amendment. The City needs to develop a process that gives the public an opportunity to be heard by the legislative body. To the extent that Resolution 13-01 frustrates public participation, it is out of compliance. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Amended Final Decision and Order, (December 5, 2002).

- A failure in the public participation process undermines the very core of the GMA and the legitimacy of adopted or amended comprehensive plan provisions and development regulations. The City must err on the side of involving the public in its GMA decisions. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Amended Final Decision and Order, (December 5, 2002).

- A key objective of the Growth Management Act (GMA) is "to dramatically increase public participation in land use planning." *Wilma v. Stevens County*, 1999 WL 373802 *4 (1999). The foundation for public participation is built upon the statutory requirements of RCW 36.70A.020(11) (planning goal encouraging citizen involvement); RCW 36.70A.035 (notice provisions); and RCW 36.70A.140 (participation programs). The GMA is a "bottom up" planning process designed to ensure that "citizens, communities, local governments, and the private sector coordinate with one another in comprehensive land use planning." *City of Des Moines v. Puget Sound Council*, 97 Wn.App. 920, 932, 988 P.2d 933 (1999). A failure in the public participation process undermines the "very core of the Growth Management Act" and the legitimacy of adopted comprehensive plan provisions and development regulations. The City of Yakima's process in this case is fatally flawed. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision,(December 5, 2002).

- Local government has a duty to be clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. The court in *City of Burien v. Central Puget Sound Growth Management Hearing Board*, 53 P.3d 1028 (2002) set forth the general rule as follows:

> In its order, the board explained that while the requirement to consider public comment does not require elected officials to agree with or obey such comment, **local government does have a duty to be clear and**

consistent in informing the public about the authority, scope and purpose of proposed planning enactments. (Emphasis added.)

This duty has been historically recognized by Growth Hearings Boards. *Friends of the Law v. King County,* 1994 WL 907890 (1994) (describing notice as "truth in labeling" and stating "[t]he county must also take great care to use concise, clear and unambiguous language in its notices"; *City of Burien v. City of SeaTac,* 1998 WL 472511 *6 (1998); *West Seattle Defense Fund v. City of Seattle,* 1995 WL 903147 *51 (1995) ("local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning amendments"); and *Happy Valley v. King County,* 1993 WL 839722 (1993) ("meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of the proposed planning enactments"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The onus is not placed on the public to decipher ambiguous or misleading notices. *Vashon-Maury v. King County,* 2000 WL 1717577 (2000) ("To place the onus on the public to find out about the hearing, as the county suggests, misplaces the duty on the citizen rather than on government"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The duty to provide clear and consistent information on planning enactments includes the mandate to provide "effective notice." RCW 36.70A140 ("public meetings after effective notice."). Effective notice is central to the planning process and "is a necessary and essential ingredient in the public participation process." See, e.g., *WRECO v. City of Dupont*, 1999 WL 33100212 (1999) ("it is axiomatic that without effective notice the public does not have a reasonable opportunity to participate"); and *Vashon-Maury v. King County,* 2000 WL 1717577 *6 (2000) ("the foundation for plan making is public participation"). The issuance of "effective notice" prior to public hearing is the lynchpin of the public participation process. In the absence of "effective notice," the entire process fails to meet legislative mandates for public participation and citizen-based determinations with respect to land use planning. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The City of Yakima failed to provide the community with "effective notice" of the proposed planning enactments. The confusion was perpetuated throughout the process. Despite knowledge of confusion regarding the proposal, no effort was made to correct the deficiencies and involve the community in this important proceeding. This cuts to the "very core" of GMA and cannot be excused as "minor errors" or "technical flaws." *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- The implied commitment to an outcome impairs the subsequent public participation in the comprehensive plan process. Inherent in the concept of public participation is the necessity that decision makers exercise legislative authority in an independent and unencumbered manner. For the GMA process to work, the public must be heard before commitments are made by the local jurisdiction. Here, they were not. The development and signing of the Memorandum of Understanding was the first step in the development and enactment process for the comprehensive plan amendment. A true and independent public participation process cannot exist under the shadow of a nonpublic process carrying an implied commitment to a

particular outcome. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- While the Board recognizes that a "Memorandum of Understanding" is important for a developer, those portions relating to the amendment to the Comprehensive Plan must be subject to the GMA public participation process. The vitality of public participation and independent decision-making cannot and should not be eviscerated by pre-existing, nonpublic contractual agreements. While arguably not a contractual obligation, the Memorandum of Understanding commits the City to a course of action and an implied outcome. If it did not do that, the developer would not commit the substantial sums of money necessary to proceed with the development. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Public opinion cannot be used to override a requirement of the GMA. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- The Growth Management Act requires those jurisdictions planning under the Act to encourage citizen participation and involvement in the process.

  Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." No similar standard is given for the designation of agricultural, forest, mineral resource lands, or critical areas as required in RCW 36.70A.170. *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- The public participation process under review is a legislative process and as such is free of the constraints found when the same body serves in its quasi-judicial functions. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public or private contacts. This is the very essence of holding elected office. This does not mean,

however, that local governments are free from constraints imposed by GMA. The legislative body is constrained in several ways by the Act. First, the Act removes the "no action alternative" and sets minimum standards for the ordinance. Second, the Act mandates that jurisdictions "encourage the involvement of citizens in the planning process," provided the public process may not override the requirements of the Act, or be contrary to the planning goals at RCW 36.70A.020 in any degree greater than necessary to resolve conflicts between the goals. "Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed." *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

- Public participation is a necessary and important element of the Act. "Public opinion cannot be used, however, to override a requirement of the Growth Management Act." *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Public participation is a guiding concept of the Growth Management Act. It is through a viable, open public process that a county develops its plan. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- This is a legislative process. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public and private contacts. This does not mean, however, that the County is free from constraints imposed by the GMA. The Act sets minimum requirements that may not be overridden, and it requires that actions taken be consistent with the record. Local governments may choose from a wide array of alternatives, provided they employ a valid public process and the record substantively supports their decision. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- The heart of the GMA's public participation requirement is RCW 36.70A.140 and .020(11). Local governments planning under GMA are mandated to establish procedures for early and continuous public participation in addition to any other existing statutory requirements. This Board has always held that public participation is the very core of the GMA. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- In addition to the public participation-planning goal, the public participation requirements and coordination requirements are expanded upon in subsequent sections of the Act, in

particular RCW 36.70A.100, .110, .140 and .210. *City of Ellensburg v. Kittitas County*, EWGMHB 95-1-0003, Final Decision and Order (Aug. 22, 1995).

- The RCW 36.70A.140 provision stating "errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulation invalid if the spirit of the procedures is observed" is addressing specific public participation concepts and citizen involvement in the GMA process. The language cited refers to the citizen involvement process addressed in Section 140. Neither does this language limit the requirements imposed by other sections of the Act, nor does it override the agreement into which the parties entered. *City of Ellensburg v. Kittitas County*, EWGMHB 95-1-0003, Final Decision and Order (Aug. 22, 1995).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The Board finds that, while the Act requires that elected decision makers consider public opinion in formulating compliance with the GMA, public opinion cannot be used to override a requirement of the Act. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The Act does not prescribe how public participation shall occur, it provides only that there be extensive public participation. The County's division of the plan adoption process into the six geographical areas is a creative way to encourage comment from those affected and allows the plan to better coordinate the planning of such a diverse county. A single meeting or several meetings on a single plan might not have provided the same level of public comment. Such a complex and massive meeting might very well diminish the public input. We must look at the process and judge whether the spirit of the Act is carried out. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The GMA does not require petitioners to concur or agree with the decisions made by the county. The Act requires a certain process be followed prior to the county making those decisions. If the county followed this process and the decisions are in compliance with the Act, they stand. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The State Legislature adopted separate public participation requirements when they adopted the direction to establish the IUGAs. If the Legislature had wanted the counties to meet the requirements of RCW 36.70A.140, it would have been easy for them to do so. It did not. The process of designating IUGAs does not require the same public participation required for the development and adoption of the comprehensive plan. *Howe v. Spokane County*, EWGMHB 97-1-0001, Final Decision and Order (Jun. 19, 1997).

- No one-size buffer or riparian management area fits all. However, criteria or standards must be specified for use when a site is reviewed and when an agreement is negotiated between the county and the landowner. There must also be no notice to interested parties or to the State, so they might provide input on the management of the land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Compliance and Rescinding Invalidity Concerning Critical Areas (Sep. 2, 1998).

- The elected decision makers need not agree with all that participate or even with the majority of those speaking, as long as they comply with the GMA. They must, however, give the people of the county a chance to express their views on pending county action. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Compliance and Rescinding Invalidity Concerning Critical Areas (Sep. 2, 1998).

- A key objective of the Growth Management Act is to dramatically increase public participation in land use planning. *Saundra Wilma, et. al. v. Stevens County,* **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

- The Growth Management Act requires those jurisdictions planning under the GMA to encourage citizen participation and involvement in the process. Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans."

  The GMA does not prescribe how public participation shall occur, it provides only that there be extensive public participation. The process must be examined to determine whether there is adequate public participation.

  This Board has always held that public participation was the very core of the Growth Management Act. Without it the legislative body cannot possibly know what its jurisdiction's needs are. *Saundra Wilma, et. al. v. Stevens County,* **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

- The City contended they faced an emergency, yet the evidence before the Board demonstrates the claimed problem has been known for some time. The planning commission did not agree there was an emergency. The result of the process was a rushed-through change to the Comprehensive Plan with little public participation, little knowledge of the changes and their effects. There was not a public participation plan and little input.

  Public participation is the flagship of the Growth Management Act and is jealously guarded by this Board. While there is a legitimate argument we do not have the jurisdiction to rule on the action by a City to declare an emergency, which is not the case here. The City claimed there was an emergency as provided for under RCW 36.70A.130 and as such they believed

they could amend the Plan more often than every year and with less public participation. We do have the jurisdiction to review this situation. We find that an emergency did not exist which would allow the quick amendment of the Plan with less public participation than otherwise required. *Bert and Gayle Bargmann and Greenfield Estates Homeowners' Assn. v. City of Ephrata,* **(Greenfield v. City of Ephrata),** EWGMHB, Case No. 99-1-0008c, Final Decision and Order, (12-22-99).

- The GMA requires that counties and cities "establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans…. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments." RCW 36.70A.140. Additionally, the GMA notes that "errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed. 99-1-0015*; Saddle Mountain Minerals, L.L.C., et al.v. Grant County;* Final Decision and Order; (May 24, 2000).

- Public participation is a core of the Growth Management Act. RCW 36.70A.140 requires the development and wide dissemination of a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of the comprehensive land use plans and development regulations implementing such plans. The importance of the program cannot be minimized. This program must be not only developed but also widely disseminated to the public. A plan that is unknown to the public is not an adequate plan. 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001)

- The plan must also provide for early and continuous public participation. This means that the public must be involved at the beginning as well as throughout the process. The Comprehensive Plan and its development regulations are to be the result of the early and continual public input. The County's Program, while a good beginning, does not go far enough for the early and continual inclusion of the public in the process. 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001)

- Many cities and counties have used a variety of low-cost ways to include the public in the planning process. Examples include presentations of proposals in "town hall" style meetings throughout the County or at service club meetings, establishing a mailing list and mailing newsletters to interested parties, placing copies of proposals in public libraries or other public places, display advertisements or inserts in newspapers in the County, and encouraging media coverage of proposals. 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001).

- The Board finds that the public participation requirements of RCW 36.70A apply to the adoption of Title 4 and 5. Titles 4 and 5 are subdivision ordinances. RCW 36.70A.030 includes subdivision ordinances as a development regulation. RCW 36.70A.140 provides for "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." The

County has acknowledged that the subject titles are "the cornerstone of their comprehensive plan". (Dennis Sweeney, p. 2005 of County Record)

The County clearly intended that its own PPP apply. Paragraph 1 states (in part) "It applies to the adoption of …development regulations, …

While Titles 4 and 5 do not implement the comprehensive plan, they are in fact the "cornerstone" of that plan, and significantly impact the comprehensive plan and sub-area plans. To find that public participation was not required simply because the comprehensive plan had not been completed would defy the spirit and intent of the entire GMA. The Western GMHB states: "The goals and requirements of the GMA concerning public participation apply to all development regulations. Review of challenges to public participation involves a review of the entire record to determine if compliance with both the spirit of and strict adherence to RCW 36.70A.140 have been achieved" *CCNRC v. Clark County*, 92-2-0001 (FDO 9/23/98). . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- RCW 36.70A.140 states, to ensure public participation, "procedures shall provide for …consideration of and response to public comments." (Emphasis added) The Board finds Stevens County's actions clearly erroneous in its failure to consider alternatives, and to respond to public comments, contrary to both County-wide Planning Policy #8 and RCW 36.70A. 140. While errors in exact compliance with the established program will not render the development regulations invalid, the County must provide for public participation that is appropriate and effective under the circumstances presented by the board's order. The County has taken almost two years in the effort to bring them into compliance. The County had adequate time for the public participation required in a situation such as this, but failed to do so. . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Publication

- RCW 36.70A.290(2)(b) requires counties to promptly publish notice of adoption of a Comprehensive Plan, development regulations, or amendment to either, after passage. The Central Growth Hearings Board, in *South Bellevue Partners Limited Partnership et al. v. City of Bellevue et al.*, No. 95-3-0055 (1995), held: "cities, like counties, must publish notice of adoption of a Comprehensive Plan or development regulation, or amendment to either, promptly after passage."

  A key purpose of the GMA is to provide certainty in the land use planning process. Promptness of publication promotes certainty. The publication of notice of adoption triggers the sixty-day period for filing petitions for review. Publication occurring over two years after passage of the Resolutions is not prompt and does not comply with the GMA's intent. *Saundra Wilma, et. al. v. Stevens County,* **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

- RCW 36.70A.290(b) requires the County to "promptly after adoption, publish a notice that it has adopted the comprehensive plan or development regulation, or amendment thereto." This and other provisions referring to this required publication, does not prescribe the manner in which the notice must be provided. The notice must, however, give notice to interested citizens that the comprehensive plan or development regulations, or amendments thereto,

have been adopted. This publication marks the beginning of the 60-day period after which a petition challenging such adoption cannot be filed.

The reading of the "notice" or "minutes" published by Republic's only newspaper leaves this Board with the belief that a reader would understand that the challenged amendments were adopted. A petition challenging these amendments should have been filed before the passage of 60 days after such publication. The Growth Boards must presume that the actions of the County to comply with the GMA are valid. The Petitioner did not overcome this presumption. 00-1-0015: *Gary D. Woodmansee v. Ferry County*; Order on Motions; (Sep. 8, 2000).

- The Growth Management Act clearly requires publication after the adoption of the comprehensive plan or development regulations, or amendment thereto. RCW 36.70A.290(2)(b). There is no requirement for publication of the County's review of the Ferry County Critical Areas Ordinance and the County's Comprehensive Plan. Had the County amended the CP or its regulations, the result would be different. The publication that did take place was not at the request of the County and is not the date at which we calculate the 60-days. The effective date of the action taken, and the start of the 60-day clock for filing a petition for review, is February 5, 2001, the day the legislative action was taken. The petition in this matter was filed on April 12, 2001, beyond the 60 day allotted time. 01-1-0008: Concerned Friends of Ferry County, et. al. v. Ferry County; Order of Dismissal; (Jun. 8, 2001).

Quasi-Judicial

- The public participation process under review is a legislative process and as such is free of the constraints found when the same body serves in its quasi-judicial functions. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public or private contacts. This is the very essence of holding elected office. This does not mean, however, that local governments are free from constraints imposed by GMA. The legislative body is constrained in several ways by the Act. First, the Act removes the "no action alternative" and sets minimum standards for the ordinance. Second, the Act mandates that jurisdictions "encourage the involvement of citizens in the planning process," provided the public process may not override the requirements of the Act, or be contrary to the planning goals at RCW 36.70A.020 in any degree greater than necessary to resolve conflicts between the goals. "Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed." *Ridge, et al. v. Kittitas County*, EWGMHB 94-1-0017, Final Decision and Order (Jul. 28, 1994).

Reconsideration

- The Board views a hearing on a Motion for reconsideration as an opportunity for parties to point out factual or legal errors in the Board's decision. It is not an opportunity for the presentation of new evidence or re-arguing an issue. In their brief the County recognizes they can develop this record and have it considered at a later compliance hearing. The Board believes this is the proper way to develop the record and it would be inappropriate to grant the request to open the record for testimony and new evidence at the Motion for Reconsideration. *Concerned Friends of Ferry County, v. Ferry County*, **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Motion to Reconsider, (9-29-99).

Record

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd*., 96 Wn. App. 522, 532, 979 P.2d 864 (1999). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Board errs on the side of inclusion rather than exclusion with exhibits existing prior to adoption. If the documents existed prior to the adoption of the Ordinance, it is often difficult to determine if they were in fact used. The County claims these exhibits were used.

  However, the Board is hesitant to supplement the record with items that did not exist at the time the County Commissioners adopted Ordinance #2001-10. Supplemental evidence will be admitted only if it is necessary or of substantial assistance to the board in reaching its decision. Exhibits such as the summaries, written arguments, or explanations prepared by staff are particularly problematic. The declaration by Connie Krueger, A.T.C.P., while helpful to the attorney for the Respondent, is clearly argumentative and the bulk of it should not be allowed to supplement the record. However, sections 10, 11, 12, and 13 of the Krueger declaration are helpful to the Board and should be admitted. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c, Order on Respondents' Motion to Supplement the Record (March 13, 2002).

  RCW 36.70A.070(5)(a) requires a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020".

  The County drew the Board's attention to the items within the Comprehensive Plan and Regulations, which they believe shows compliance with the requirement to have a written record showing how the rural element harmonizes with the GMA goals:

  The location of most new growth in existing UGAs, which they contend reflects existing local circumstances, thereby "containing or otherwise controlling rural development" as required by RCW 36.70A.070(5)c(i) and (ii).

Resource lands are protected in several ways within the Comprehensive Plan.

The County contends there is no rural residential land designations below one dwelling unit per 5-acres, which they believe reduces the "inappropriate conversion" of land into "sprawling, low density development" and assures "visual compatibility of rural development with the surrounding rural area…."

Restrictive rural lot densities avoid urban sprawl.

The Board believes the list the County has gathered is not what the legislature intended. The legislature recognized local circumstances are often different from other counties. Because of this, the legislature allows each county to vary its patterns of rural densities and uses, based upon the local circumstances. However, the County must explain in writing how the rural element so designed, harmonizes the planning goals in RCW 36.70A.020. The items listed by the County are examples of what has been done. They are items from various parts of the Comprehensive Plan, but are not the "written record explaining how the rural element harmonizes…" In fact, number 3, above, contends the maintenance of lot size below 5-acres reduces the "inappropriate conversion" of land into "sprawling, low density development". Yet it is the existing smaller lots of less than 5 acres allowed in the Rural Residential and Rural Floating, which cause this Board concern. (See Rural Residential and Rural Floating issues below).

RCW 36.70A.020 lists 13 goals. The list given by the County touches on a few of these goals, but very little else. The written record required is for the purpose of explaining how the County's rural element harmonizes with the planning goals. Giving the Board a list of what the County has done does not begin to satisfy the requirement of the written record sought by the legislature. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Board notes the legal advertisement for consideration of the development regulations establishes a deadline of November 28, 2001, for receipt of written and oral comments. At the public hearing on that date, the Board of Commissioners extended the time for receipt of written comments to December 7, 2001. The absence of a deadline within a separate display advertisement does not change the officially established deadline. The Board must therefore conclude that the letter dated December 26, 2001 was submitted after the time for comments was closed, and cannot now be used as a basis for the Petitioners standing. Petitioners have no basis for challenging the substance of the draft development regulations under consideration at the November 28, 2001, hearing. 1000 Friends of Washington v. Spokane County, EWGMHB. 01-1-0006, Motion Order (June 7, 2002).

- This material may be admitted if it is part of the record or will be of substantial assistance to the Board in rendering its decision. The information that is old information now in a more usable format, should be admitted to supplement the record. The new information should be admitted to supplement the record but only to the extent it responds to new information offered by the Petitioners or concerns the Petitioners' request for a finding of invalidity. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Order on Motion to Take Official Notice, (October 18, 2002).

- The Board finds there is no evidence in Yakima County's record to support a change in circumstances, nor any discussion in the findings and conclusions issued by the Planning Commission and the County Commissioners that identify adequate changed circumstances. See PC 82 (Planning Commission Findings and Conclusions); Ordinance 1-2002. The Board also finds there is no mapping error warranting a change. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Final Decision and Order, (November 4,2002).

- The GMA contemplates and requires a long-term planning process that is build upon public involvement and participation. The directive is for "early and continuous public participation in the development and amendment of comprehensive plans." RCW 36.70A.140. While the Board recognizes that a direct or implied commitment is important to a developer, such commitments cannot be made outside of the public participation process. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- Because Board decisions must be based on the record, it is helpful to both the Boards and the citizens if local governments show their work and indicate the parts of the record upon which they have relied. The concept of "showing your work," is neither complex, nor burdensome. It involves a reasoned discussion of the issue in question, the selection of a choice that meets the minimum requirements established by the Growth Management Act, and is supported by the record. It need not require the use of consultants and outside experts, the local people and their government officials know their area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- RCW 36.70A.290(4) mandates that the Board base its decision on the record developed by the county with one limited exception. The Board has consistently held to this mandate. It has not, nor does it now choose to enter into a de novo review. As the County suggests there may be problems with the record, but it is the record of this case. The Act requires the Board to make its decision on this record. *City of Ellensburg v. Kittitas County*, EWGMHB 95-1-0003, Final Decision and Order (Aug. 22, 1995).

- The County must specify which documents are objectionable and must provide a list to Petitioner of the documents for which copies are requested. The Petitioner was ordered to resubmit a list of exhibits that was sequentially numbered for the case at hand. 00-1-0006: *Gary D. Woodmansee v. Ferry County*; Order on Motions; (Jul. 31, 2000).

Recreational Use

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled

to find the County is out of compliance. King County, in that case, greatly limited the uses, prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.

In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." Id p. 142. The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" id p.142. The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Id p. 142. Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." P.143.
  As in the King County case above, we find here " the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra,* P.142.

While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- RCW 36.70A.070(1) requires each county to "designate the general distribution and general location and extent of the uses of land, where appropriate, for…recreation…" The County was not required to develop parks and recreational areas where not necessary. Here the County believes there are sufficient recreation resources available. 99-1-0016; *City of Moses Lake v. Grant County;* Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000).

Remand by Board

- In the event of a "not in compliance" finding, the Board is limited to remanding the matter to the county and specifying a reasonable time not in excess of one hundred and eighty days within which the county shall comply with the requirements of chapter 36.70A RCW. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

Resolutions

- For the City of Colville, a resolution has the effect of law. In fact, the City used such a resolution to set the rules of proceedings for the City Council. The Public Participation Policy adopted by resolution here will have the effect of law and is proper. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- It has been recognized that an agreement that influences or dictates the form, substance or timing of amendments to a comprehensive plan is subject to Board jurisdiction and may be violative of GMA public participation requirements. (See *City of Burien v. Central Puget Sound Growth Management Hearings Board,* 113 Wn.App. 375, 384, 53 P.3d 1028 (2002)). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB, 02-1-0009, Final Order and Decision, (December 5, 2002).

- This Board has found counties to be in compliance with the GMA even if adoption occurs by Resolution if that jurisdiction can show resolutions have the effect of law for that County.

  Stevens County contends all their laws are adopted by resolution and it has always been that way. The County is not found to be out of compliance because they adopted these GMA provisions by Resolution rather than Ordinance. Because this matter has been remanded for other defects, the County is directed, at the first compliance hearing to present evidence, which will show the appropriateness of adopting these provisions by resolution, rather than by ordinance. *Saundra Wilma, et. al. v. Stevens County*, **(Wilma v. Stevens County)** Case No. 99-1-0001c, Final Decision and Order, (5-21-99).

- This Board has found counties to be in compliance with the GMA even if adoption occurs by Resolution if that jurisdiction can show resolutions have the effect of law for that County. . 00-1-0001: *Concerned Friends of Ferry County v. Ferry County*; Final Decision and Order; (Jul. 6, 2000)

Resource Lands – See Natural Resource Lands

Riparian Areas

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references

supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- The Record shows that the County, in Ordinance 2001-09, provided for the protection of riparian areas with the "Riparian Areas Protection Attachment". This attachment does not at this time exist. The County's plan to adopt such amendment in the future is not adequate at this time. The riparian areas are not protected. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

RAID-Rural Areas of More Intensive Development [LAMIRD]

- There are three types of LAMIRDS allowed under RCW 36.70A.070(5)(d)(i), (ii) and (iii). For simplicity, they will be referred to as Type I, II or III. In our previous orders we have referred to these as RAIDS. The Board now wishes to refer to these as LAMIRDS, as the Central and Western Hearings Boards have done. The previous acronym, RAIDS (Rural Areas of Intensive Development), left out the letters "L" and "M". The letter "L" which is for the word "limited" in "Limited Areas of More Intensive Rural Development", is a key part of this exception to rural development. James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The GMA's key goal has been to direct urban development into urban growth areas and to protect the rural area from sprawl. In 1997 the State Legislature amended the GMA to make accommodation for "infill, development or redevelopment" of "existing" areas of "more intensive rural development," however such a pattern of growth must be "minimized" and "contained" within a "logical outer boundary." This cautionary and restrictive language evidences a continuing legislative intent to protect rural areas from low-density sprawl. James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of (c)(ii) (visual compatibility) and (iii) (reduce low-density development) do not apply to those LAMIRDS designated under (d)(i). This section does not allow increased low-density development, but merely removes the reduction requirement. The logical outer boundary (LOB) provisions of (d)(iv) apply only to LAMIRDS designated under (d)(i) (Type I). Type II and III both allow "new development" and "intensification of development." Type I LAMIRDS do not allow "new development" except as it may be part of "infill, development, or redevelopment." . James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- Type I LAMIRDS consist of certain "existing areas" defined in RCW 36.70A. 070(5)(d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas "whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." An "industrial area" is not required to be

principally designed to serve the "existing and projected rural population." Thus, all other Type I LAMIRDS (commercial, residential, or mixed-use) must be principally designed to serve the "existing and projected rural population." In designating and establishing LAMIRDS under Type I a county must "minimize and contain" ((d)(iv)) the existing area or existing use. A prohibition against including lands within the LOB that allows a "new pattern of low-density sprawl" for the existing area or existing use must be adopted ((d)(iv)). Type I LAMIRDS, being neither rural nor urban, allowing existing areas or existing uses, must always be "limited" i.e., minimized and contained. James *A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- In establishing the LOB for an "existing area" (but not for existing uses) under RCW 36.70A.070(5)(d)(iv) a county is required to "clearly" identify and contain the LOB. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. We agree with the Western Growth Board and conclude that legislative intent, as determined from reading all parts of the GMA with particular emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1991. (*City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, FDO, February 6, 2001.) *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of RCW 36.70A.070(5) (d)(v) (existing area or existing use as of July 1, 1990) apply to all LAMIRDS whether designed under (d)(i) (ii), or (iii). Thus, for any "intensification" allowed under Type II or Type III the designated use or area must have been in existence on July 1, 1990 (or later date under the provisions of (5)(B) or (C)). This restriction does not apply to "new development" authorized under Type II or Type III. Anytime the phrase "existing" is used to define an area or use, the provisions of RCW 36.70A.070(5) (v) (7-1-90 or as here, 7-91) modify that phrase. *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- Under Type II, small-scale recreation or small-scale tourist LAMIRDS are authorized. Commercial facilities to serve those LAMIRDS are allowed. The intensification or creation of small-scale recreational or small-scale tourist uses must rely on a rural location and setting. Such LAMIRDS cannot include new residential development. The uses need not be principally designed to serve the "existing and projected rural population." "Public services and public facilities" must be limited to those "necessary to serve" only the LAMIRD. Such public services and public facilities must be provided "in a manner that does not permit low-density sprawl." *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The LAMIRDS allowed under Type III authorize intensification or creation of "isolated cottage industries and isolated small-scale businesses." These need not be principally designed to serve the "existing and projected rural population" and non-residential uses. They must provide job opportunities for rural residents. Public services and public facilities have the same constraints as those provided under Type II.

  The allowance of small-scale recreational and small-scale tourist uses, isolated cottage industries and isolated small-scale businesses are also subject to the provisions of RCW

36.70A.070(5)(a), (b), and (c), as well as the definitions contained in RCW 36.70A.030(14) and (15). *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The County designated 37 LAMIRDS as combinations of Type I, II and II. The County did not separate them and the Board must believe the County intends all three types to be included in each LAMIRD. The County contends the GMA does not require each LAMIRD be segregated into a separate designation as a Type I, II or III. They further cite a Western Board decision, *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, as supporting this contention. This is not correct. The GMA identifies three types of Limited Areas of More Intensive Rural Development. The County must chose, which LAMIRD is appropriate for the specific site. To hold otherwise would be to ignore the law and the cases that interpret the law. . *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The statute, RCW 36.70A.070 (5)(d) is the best place to start to find that the GMA established three separate LAMIRDS. The Statute talks of the rural element to "allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:"

  The argument that there are three separate types of LAMIRDS is clearly supported when you examine the three paragraphs that are set apart, listing the type of LAMIRD and the limitations for each type. To have all three types in the same space without boundaries between them would not only be confusing but virtually impossible. Type I is a mixed-use area that can have residential development infill. This must be bound by logical outer boundaries delineated predominately by the built environment. The same case cited by the County, *Skagit, Supra*, asserts that these limitations, RCW 36.70A. 070(5)(d)(iv), do not apply to Types II and III. Further, Types II and III can have new development, isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population contrary to Type I. Also Types II and III do not allow residential development. *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- The County cited dictum found in *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precem0jdent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County*, WWGMHB No. 96-2-0023c, Compliance Order, August, 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *James A. Whitaker v. Grant County*, EWGMHB, 99-1-0019, Order on Compliance, (May 6, 2004).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997. The Legislature amended RCW 36.70A.030, adding a new subsection, which provides: RCW 36.70A.030(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan. Citizens for Good Governance, 1000 Friends of Washington and City of

Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Legislature at the same time amended RCW 36.70A.070, which clarified the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions, more intense rural development would constitute an impermissible pattern of urban growth in the rural area. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (iii), (iv), and RCW 36.70A.110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for a UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that, even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. RCW 36.70A.070(5)(d)(iii). Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- While the Board recognizes that RCW 36.70A.070(5) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County argued that its decision to establish RAIDs is justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." However the County provides no written record of the local circumstances identified. The quote referred to by the County in their brief, speaks of the Blalock area being characterized by land uses which include small-scale farms, single-family homes, limited commercial uses and open space. Very little more is found that might relate to the creation of the boundaries of the RAID and what is included therein. The County has failed to properly limit the area of the RAID. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- If the County used local circumstances to guide them in the development of the rural element, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). The County has made no attempt to explain in writing how the rural element harmonizes the planning goals. Absent the Act's mandated written explanation, the County has not complied with RCW 36.70A.070(5)(a). Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Further the County failed to give this Board any clear statement of the area existing at the time Walla Walla County opted into the GMA, October 30,1990. It is this date that is to be used to limit the boundaries of a RAID. The Findings of Fact adopted by the County contain no analysis of areas existing in the Blalock region by actual lot sizes due to common ownership of adjacent platted parcels and are devoid of findings regarding uses as of October 30, 1990, relying instead solely upon historic platting and current uses to justify its "rural transition" region. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- In addition to the County's failure to follow the steps found in the GMA for the designation of Rural Areas of More Intensive Development (RAID), the Board finds that the County erred due to the RAID's proximity to the City of Walla Walla. The Blalock area is up against the UGAs of both the City of Walla Walla and College Place. The 1997 Legislative amendment allowing RAIDS was clearly done to let the county do something with unincorporated concentrations of urban-like growth apart from existing cities. However, RCW 36.70A.110(3) provides that Urban Growth Areas should be first located in areas already characterized by urban growth that have adequate existing public facilities and service capacities to serve such development. Second, UGAs should include areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Here, Walla Walla County did not include the Blalock Orchards area within the City of Walla Walla's UGA. Instead, the County chose to place Blalock Orchard in a RAID up against the City of Walla Walla's UGA. Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Because the County has not followed the GMA requirements for a RAID, has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA, has not adequately shown this Board data in the record of how the 1990 boundaries of the developed area were determined and have located this RAID virtually up against the City's UGA, the Board is compelled to find the Rural Transition zone out of compliance. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v.*

Walla Walla County, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Board finds that the Blalock Orchards Rural Transition zone as presently configured, constitutes an impermissible pattern of urban growth in a rural area. The Board determines this designation does not satisfy the exception to the prohibition of urban growth in rural areas provided by RCW 36.70A.070(5)(d). In addition, the County has failed to explain in writing how the Rural Transition zone harmonizes the planning goals of the GMA as required by RCW 36.70A.070(5)(a). *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- If the language was chosen before the statute was changed and we must look at what the parties meant at the time the language was drafted. However, the language found in Grant County's CPP 2B is different and speaks of "urban densities". The Committee adopting the CPPs has stated this prohibition two different ways. One way might be technically challenged and said to not prohibit RAIDs, but not so with 2B. It was clear the Countywide Planning Policies intended to prohibit urban densities outside urban growth areas and the later amendment of the GMA does not change this conclusion. 99-1-0019; *James A. Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000)

- In a May 23 2000 FDO the Board found the County RAIDs are out of compliance with the GMA because they violate the CPPs. This remains true. The County also was found to not have developed "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). This still needs to be done. The written "Policy Plan" pointed to by the County does define the planning concepts and principles embodied in the Plan, but it was not what the GMA was seeking in this case. The requirement for a written record was added at the same time the option for RAIDs were given to the County. The Board finds the Legislature was seeking a written statement of how the Raids harmonize with the goals of the GMA. The County has not done this. 99-1-0019; *James A. Whitaker v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000); 99-1-0016; City of *Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration;(Aug. 7, 2000).(Upheld, Thurston Co. #00-2-01622-8).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new

subsection allowing RAIDs Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. 99-1-0019; James *A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000). 99-1-0016: *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. 99-1-0019: *James A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000). 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

  RCW 36.70A.070(5)(d)(ii) applies to development that does "not include new residential development." The RAID designation clearly does not preclude new residential development (indeed, it permits it as a matter of right); thus, (5)(d)(ii) cannot be invoked by the County here – it does not apply. 99-1-0019; James *A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000)

- RAIDs are justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." When considering local circumstances, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). 99-1-0019; *James A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant Cou*nty; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

- The fact that the GMA was amended, thus allowing the designation of RAIDs by the County does not change the mandatory nature of the CPPs. The County did not have to create the RAIDs. They were allowed to do so. If they wished to do so, the County had the option of requesting a change in the CPPs. This would give the local jurisdictions input, coordinate the plans as required by the GMA and make the change if desirable. This was not done. The Raids are contrary to directives of the County's CPPs. 99-1-0019: *James A. Whitaker v.*

Grant County; Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant County;* Order on Respondent's Motion For Reconsideration;(Aug. 7, 2000).

RCW 36.70A.070(5)(d) does not prohibit the development of undeveloped lands within RADs, under certain conditions. We find that the conditions established in the Curlew Lake Sub-Area Plan fall within the limits found in RCW 36.70A(5)(d)(iv). 95-1-0010 *Woodmansee and Concerned Friends of Ferry Co. v. Ferry County;* Order on Remand (October 24, 2000).

Rural Centers

- A county's decision to allow, "designated rural service centers" is restrained by the same prohibition against urban growth outside the urban growth areas. New residential development in these centers must be limited to rural densities and non-residential growth must be limited to uses dependent by their very nature on a rural location and functionally and visually compatible with the surrounding rural/resource land character. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Commercial uses within a Rural Service Area are restricted to those uses dependent upon a rural area or to serve the needs of the residents of the rural area. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Order on Compliance (Apr. 16, 1997).

Rural Densities

- The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County*, EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

- *Achen v. Clark County, supra*, cited by the County, does not require the Board to approve the 2.5-acre lot in rural areas. In that case the Superior court did direct the Board to give deference to the County, especially with rural density. However, the Board decision was not reversed as to a similar size lot or did it give direction to accept a 2.5-acre lot size. What it did was tell the Board to give deference as the new legislation asked, and do so in that case. This Board does give great deference to the County decisions so long as they are in compliance with the GMA. The discretion given to the County is very broad, but must fall within the sideboards of the GMA. This density is outside those sideboards. *City of Moses Lake v. Grant County*, EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

- We disagree with the statement made by the County that "the GMA gives the County, … the authority to determine appropriate lot sizes and uses in rural areas," if that statement means that the County believes there is no role for the GMA in that decision. The GMA does limit the amount of previously unbridled discretion of local governments to "determine appropriate lot sizes and uses in rural areas." This is because of RCW 36.70A.060, .070, .170, and .020(8). *City of Moses Lake v. Grant County*, EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

Rural Element

- While the Act does allow for a variety of densities in rural areas, the densities must preserve the rural character of the area. The Board notes that the approval process allows lots as narrow as 200 feet. Houses on multiple adjacent lots only 200 feet wide is urban and will not preserve the rural character of the area. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Respondent argues the provisions allowed in the Rural Floating zone were to balance the goals of GMA, reduce sprawl, and to protect private property rights. The Board applauds the County's actions to change the existing 10-acre minimum lot size to 20 acres, but feel the allowance of a 2-3 acre "overlay" zone is inconsistent with that change. The Board also finds it does not protect the property rights of either existing residents or vacant property owners in the area. Such small, narrow lots will degrade the rural character, reducing the appeal of the area as a place to live, to the detriment of present and prospective residents. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Having said this, the Board acknowledges the work of the residents in this zone to protect both the rural character of the area, and legitimate property rights, including potential for further development. However, more work needs to be done. The Board recognizes the possibility of unique circumstances in this zone, and the potential to increase protection of critical areas. While not drawing a "bright line" test of a minimum 5-acre lot size for this rural area, any criteria applied must ensure protection of critical areas and the rural character of the area. While not addressing minimum lot sizes here, The Board finds that minimum lot widths of 200 feet are not in keeping with a desirable rural character. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The effect of the County's action here would be to continue the existing zoning at urban density in the face of statutory direction to prohibit urban growth in the Rural Element. The continuation of urban densities creates an impermissible pattern of urban growth in the rural area. Lot density, in conflict with the overall 5-acre zoning, will have a substantial impact on the density of this rural area. *1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The fact that such zoning existed prior to the adoption of the Plan is no excuse to continue it. The size of many preexisting platted lots is not at rural density. Where possible, the County must change what has been happening before if it violates the GMA. We addressed a similar issue in *City of Moses Lake v. Grant County,* Case No. 99-01-0016, Final Decision and Order, May 23, 2000. *1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- Allowing previous lot sizes to exist on vacant land just because that is what they are now platted for, ignores what the GMA is trying to do. Anything below 5-acre lot size is out of compliance for the remaining undeveloped lands in this rural area. *1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The Growth Management Act specifically differentiates between agricultural resource lands and rural lands. County residents who desire a rural lifestyle should have the opportunity to purchase rural home sites in rural areas that do not have long-term commercial value as agricultural land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Final Decision and Order (Aug. 8, 1994).

- A county's decision to allow "designated rural service centers" is restrained by the same prohibition against urban growth outside the urban growth areas. New residential development in these centers must be limited to rural densities and non-residential growth must be limited to uses dependent by their very nature on a rural location and functionally and visually compatible with the surrounding rural/resource land character. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. 99-1-0019; *James A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration;(Aug.7, 2000).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new subsection allowing RAIDs, Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. 99-1-0019; *James A. Whitaker v. Grant County;* Final Decision and Order; (May 19, 2000); 99-1-0016: *City of Moses Lake v. Grant Coun*ty; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

- RCW 36.70A.070(5)(d)(iii) contemplates the rural industrial uses permitted (but not required) by the County. However, the application of (5)(d)(iii) is limited by that paragraph's reiteration of the Act's prohibition of low-density sprawl and by (5)(d)(iv)'s requirements to minimize and contain any existing areas or uses of more intensive rural development. While the Board recognizes that (d)(iv) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be

'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. . 99-1-0019: *James A. Whitaker v. Grant County*; Final Decision and Order; (May 19, 2000); 99-1-0016; *City of Moses Lake v. Grant County*; Order on Respondent's Motion For Reconsideration; (Aug. 7, 2000).

Sequencing

- The Petitioners are asking that the Board find that the County is not properly sequencing the planning under the GMA. The examples given by Larson Beach are accurate and demonstrate why the GMA establishes a sequence for the adoption of Public Participation, Interim Urban Growth Areas, Resource Lands designation, Critical area Ordinances, etc. When these steps are not followed it becomes difficult if not impossible to protect what is required to be protected, plan for what is required to be planned for, or prohibit what is required to be prohibited. . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- The failure of the County to properly sequence planning under the GMA requires the Board to look at Titles 4 and 5 more critically. While much of these titles might not otherwise be out of compliance, their passage without the designation and conservation of Resource Lands and the planning found in a Comprehensive plan, forces us to again find these titles out of compliance. These titles interfere with the Goals of the GMA more than is first realized. The State Legislature specifically directs the County to designate and conserve Resource Lands and Critical Areas prior to the other required actions. (RCW 36.70A.060 and .170). The Short and Long Plat Ordinances of the County allow subdivisions, large and small, throughout the rural areas, including areas that one would expect to find Resource lands and Critical areas. The out of sequence adoption of these regulations cause a real frustration of the goals of the GMA. . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- RCW 36.70A.060 requires Stevens County to first "adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170." That section of the GMA goes on to require the County to place a notice in all plats or permits that allow activity within 500 feet of resource lands that such resource lands are there and that certain activities may occur which may not be compatible with residential development. This notice makes sense only if the resource lands are designated. . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Service

- WAC 242-02-230(1) requires a copy of the Petition be served promptly upon Respondent, and as Respondent was a county in this matter, the county auditor shall be served. 00-1-0008: *David M. Abercrombie v. Chelan County;* Order on Dispositive Motion; (Jun.16, 2000).

  Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC. It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the evidence presented. 00-1-0008: *David M. Abercrombie v. Chelan County*; Order on Dispositive Motion; (Jun.16, 2000).

Shorelines

- The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW "shall be considered a part of the county or city's development regulations." The same statute provides that the shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW, rather than the procedures set forth in the GMA. The County's Shoreline Master Program was already an element of the CP as provided by law. Its amendment will be pursuant to 90.58 RCW. 99-1-0016*: City of Moses Lake v. Grant County*; Order on Petitioner's Motion for Reconsideration; (Aug. 16, 2000).

Shorelines Master Program (SMP)

- The Comprehensive Plan is a policy document, to be implemented by development regulations. The County's actions under review here are the development regulations, Ordinance No. 2001-09. That Ordinance incorporates the pre-GMA SMP. The County's Ordinance now brings their SMP before the Board for review because the SMP is the method adopted by the County to implement that portion of the CP. The Board will review the County's SMP to determine whether the provisions therein adequately implement the Comprehensive Plan and protect or regulate as therein provided. The Board does not review the SMP itself as to its validity, but rather its use to comply with the GMA. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

- Presumably, the County offered no argument defending buffers in the existing SMP because they plan to adopt a new SMP, including best available science. However, we must rule on the adequacy of the existing protections using the SMP. It is clear the existing SMP does not adequately protect shorelines and their associated on-shore and offshore habitat as required by RCW 36.70A.172 and RCW 36.70A.060. *Concerned Friends of Ferry County and David L. Robinson v. Ferry County*, EWGMHB, 01-1-0019, Final Decision and Order, (June 14, 2002).

"Show Your Work"

- This Board has consistently required the Counties to show their work, especially in cases such as this. Here the parties did not agree upon the boundaries of the City of Spokane UGA. This, together with its last minute changes, emphasizes the need for "showing the work". The Board has a difficult time resolving such issues where there is little or no record or a record insufficient to determine what happened. However, because the County has been found out of compliance in previous issues, it is not necessary to reach this issue. The Board expects the County to show its work at the future compliance hearing held to determine if they have brought themselves into compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the SRP site. Specifically, the Board finds that the County's criterion was not properly applied in denying the designation of the SRP site as mineral resource land. The County has not "shown its work" regarding application of the criteria to the SRP site or to other nearby sites which did receive designation as mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB, 02-1-0003, Final Decision and Order, (July 19, 2002).

- Because Board decisions must be based on the record, it is helpful to both the boards and the citizens if local governments show their work and indicate the parts of the record upon which they have relied. The concept of "showing your work," is neither complex, nor burdensome. It involves a reasoned discussion of the issue in question, the selection of a choice that meets the minimum requirements established by the Growth Management Act, and is supported by the record. It need not require the use of consultants and outside experts, the local people and their government officials know their area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- The Board has consistently recognized that the planning goals may be at some point inconsistent. It has also found, in almost all cases, that potential inconsistencies may be successfully reconciled. Counties and cities have a duty to attempt to harmonize the goals. They must consider and show their work where they cannot. It is one thing to suggest that achieving the housing goal conflicts with the goal of reducing sprawl, it is quite another to show that these goals cannot both be achieved. Where a jurisdiction holds that one planning goal should be sacrificed at the expense of another, the record must show the decision making process. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- If a jurisdiction is unable to harmonize the planning goals, the record must show that the decision makers engaged in a valid process and considered the matter. This is the "show your work" standard. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

- The GMA does not specify the manner by which a county should show its work. The Board's decisions have required counties to "show their work," but do not provide a uniform method for such a showing. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designation. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- Local circumstances, traditions and identity will result in unique choices and solutions by each County and each City within it. Jurisdictions have broad discretion to make IUGA policy decisions. While such policy choices may be included in the sizing or configuration of the IUGA, they must be made in a measurable way and with sufficient documentation as to the rationale. *Kenneth and Sandra Knapp et. al., v. Spokane County*, (**Spokane County**), EWGMHB Case No. 97-1-0015c, Order on Fourth Compliance Hearing, (8-23-99).

- The County and City of Marcus has provided this Board with an adequate record of the process of sizing the Marcus IUGA. While the IUGA is large, it includes extensive areas unavailable for building or areas designated as open spaces and greenbelts. The County is

entitled by law to a strong presumption of validity and we believe the Intervenor has not overcome this presumption. 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001)

Sprawl

- The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County*, EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

Standard of Review

- The Washington State Legislature granted the Growth Management Hearings Boards jurisdiction to hear matters relating to RCW 43.21 (SEPA) as it relates to plans, development regulations or amendments adopted under the GMA. The Board recognizes that the Petitioners actively participated in the joint hearing process where the EIS and the Comprehensive Plan was discussed. This together with the careful reading of WAC 197-11-545(2) in full and our liberal examination of standing, we find that the Petitioners have standing to challenge the adequacy of the EIS herein. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The EIS performed was adequate for a non-project EIS. The Board finds the law does not require the examination of each and every potential option. The contents of the EIS on non-project proposals are described in WAC 197-11-442. That code provision declares that the County "shall have more flexibility in preparing EISs on non-project proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents . . .." WAC 197-11-442(1). *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County has flexibility in preparing the non-project EIS for the Comprehensive Plan. WAC 197-11-443(2) provides that a "non-project proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed consistent with the approved non-project action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the non-project EIS. The scope shall be limited accordingly..." *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County further argues that the challenged amendments were within the range of alternatives considered in the environmental impact statement (EIS) prepared pursuant to the State Environmental Policy Act (SEPA) and simultaneous with the development of the Comprehensive Plan. Therefore the County was not required to provide additional opportunities for public comment pursuant to RCW 36.70A.035(2)(b)(i).

- Again, this Board cannot agree with the County. The alternatives were discussed only generally in the environmental impact statement and do not approach the specificity required that would have alerted interested members of the public that the challenged amendments would be considered and adopted with the Comprehensive Plan. We therefore find that the 72 amendments were not within the range of alternative addressed in the environmental impact statement. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County,* EWGMHB o1-1-0018, Final Decision and Order, (June 4, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. City of Walla Walla, *Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County,* EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- The use of previously prepared documents in this process was appropriate and not a violation of the GMA or SEPA. The shortened process was to avoid duplication and was designed for a time such as this where most of the work had already been done. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The City does not contend that it considered alternatives as is required. This GMA action was to change the zoning of the subject parcel of land to Commercial. It is not project specific and is site specific. The range of alternatives is restricted. The major alternative was no action. Detailed options that deal with the specific project of Wal-Mart are being dealt with at the permitting stage. *Saundra Wilma and Alan D. Wilma, v. City of Colville*, EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The Board has recognized, in this case, that conditions unique to Ferry County must be reflected in our standard of review. Ferry County, while having a land area approximately the same size as King County or Whitman County, has a local property tax base of only 0.2% of King County and 21% of Whitman County. Ferry County's entire road department budget is less than $250,000. Clearly, Ferry County is constrained by financial circumstances in how it can reasonably respond to the GMA. The Board views our responsibility under the GMA to recognize local circumstances in our decisions. Counties not similarly constrained should not expect the same latitude given to Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB 95-1-0010, Second Order on Compliance (Aug. 22, 1997).

Standing

- Here, Petitioner argues the County is offering a "hyper-technical rationale that a petition must contain specific, canonical language to establish standing". They also note the Index of the Record includes Exhibit Two "comments submitted by Concerned Friends of Ferry County", clearly indicating participation, not just appearance at a hearing.

While pro-se litigants must adhere to the same set of rules as attorneys, we find that Petitioners have adequately established their standing. To rule otherwise would require this Board to ignore the record and the petition as a whole. The Board recognizes the spirit of the GMA is to encourage citizens to participate, not limit participation through a technical interpretation of standing requirements. A review of the record and petition clearly establishes that the Petitioners did participate in the matters raised in their petition; the County knew what type of standing they were claiming. *Concerned Friends of Ferry County and David Robinson v. Ferry County* EWGMHB, 01-1-0019 Amended Motion Order, (April 16, 2002).

- The Board notes the legal advertisement for consideration of the development regulations establishes a deadline of November 28, 2001, for receipt of written and oral comments. At the public hearing on that date, the Board of Commissioners extended the time for receipt of written comments to December 7, 2001. The absence of a deadline within a separate display advertisement does not change the officially established deadline. The Board must therefore conclude that the letter dated December 26, 2001 was submitted after the time for comments was closed, and cannot now be used as a basis for the Petitioners standing. Petitioners have no basis for challenging the substance of the draft development regulations under consideration at the November 28, 2001, hearing. *1000 Friends of Washington v. Spokane County*, EWGMHB. 01-1-0006, Motion Order (June 7, 2002).

- For the Petitioner to have standing, the Growth Management Act (GMA) requires oral or written participation in the matters raised by the Petitioner herein. The reason for such requirement is to allow the County to know the Petitioner's objections and be able to respond to them if they feel it is appropriate. It was clear to the County what the objections of the Petitioner were and he participated actively in the hearings prior to the adoption of the CP and CFP. For us to now find that the Petitioner did not have standing after such participation would be a hyper technical reading of the statute. The Petitioner did participate on the matters raised herein. *Harvard View Estates, v. Spokane County*, EWGMHB, 02-1-0005, Final Decision and Order, (July 29,2002).

- RCW 36.70A.280(2) does not limit standing to parties appearing before the county's legislative authority. Since the county has yet to hold a public hearing, such a narrow construction would effectively bar the petitioner from making its claim. Local governments may not evade the requirements of the GMA by failing to comply with the Act's deadlines. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that Petitioner [of a County action] has standing for the following reasons: (1) Its appearance and participation in both the City of Chelan Planning Commission hearing and the City of Chelan City Council meeting regarding Interim Urban Growth Areas became part of the record available to the Chelan County Board of County Commissioners, (2) the development of Interim Urban Growth Areas is of necessity a collaborative effort between the County and the City of Chelan in this case, and (3) Petitioner spoke with the county planning staff, including the director of the department, regarding the matter in question on several occasions. The cumulative effect of Petitioner's actions is sufficient to confer standing. The Board would not find standing if Petitioner had only met with the county planning staff, but that is not the case. Its meetings with the staff simply add to the

cumulative weight of its acts. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Order on Motions (Mar. 24, 1994).

- This Board has previously ruled the Growth Management Act (GMA) standing provisions should be interpreted broadly. *Woodmansee et al. v. Ferry County* EWGMHB Case No. 95-1-0010, FDO, (5-13-96).

- In 1995, the Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA as part of regulation reform legislation (RCW 36.70A.280). The stated purpose was to simplify regulatory compliance. Standing for issues before this Board is under the GMA and Cascade Columbia Alliance has adequately demonstrated standing.

  The Board finds that standing under the GMA is sufficient standing to raise SEPA issues before this Board. This decision concurs with the ruling of the Western Washington Growth Management Hearings Board in *Achen, et al. v. Clark County* WWGMHB No. 95-2-0067. *Cascade Columbia Alliance, v. Kittitas County*, **(Cascade Columbia Alliance)** EWGMHB Case No. 98-1-0007, Order on Motions, (3-1-99).

- The Growth Management Act does not require issue specific standing. The GMA, as interpreted by the Court of Appeals, requires only that the petitioner's participation be reasonably related to the issue presented to the Board. (*Wells v. Hearings Board*, 100 Wn. App. 656 (2000). The Petitioners here have given us detailed instances where they orally or in writing participated on matters related to the issues raised by their Petition. The Board was able to find this documentation in the record and review it. This is adequate for a showing of standing under the GMA. The contention by the County that the failure to provide specific record citation prevented the review of the evidence of standing is unacceptable. This Board was able to adequately review that material. These Petitioners have provided sufficient information to substantiate their standing. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order On Motion; (Apr. 23, 2001)

- In 1995, the Washington State Legislature expanded the Growth Management Hearings Board's jurisdiction to include SEPA actions taken to comply with the GMA. There is nothing in RCW 36.70A.280(1) that indicates a legislative intent to treat standing requirements for a SEPA challenge different than any other GMA standing requirement. The Hearings Board has no authority in the GMA to engraft a different and more rigorous standing requirement for SEPA challenges than that which is set forth in the plan language of the statute. The cases cited by the County do not apply to the question of whether a person with "appearance standing" may bring a SEPA challenge under the GMA. We find no reason to change our belief that standing for all issues raised before this Board should be measured by the requirements of the GMA, RCW 36.70A.280(2)(b). 01-1-0002; Loon Lake Property Owners Association, et al v. Stevens County; Order On Motions; (Apr. 23, 2001).

- The County contended the document supporting standing was a letter from the Petitioner's attorney, not a party. The Petitioner's attorney is the representative of the Petitioners and clearly stated in the letter that he was speaking for the parties. This type of representation is so much a part of this country's legal system it would be difficult to believe you are not allowing an attorney to speak for a party. This participation is cognizable for purposes of standing if the attorney states that he or she is representing the parties in that matter. 01-1-

0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order On Motions; (Apr. 23, 2001).

- Issue 8 is an allegation of the County's failure to transmit copies of the subdivision codes to the Department of Community, Trade and Economic Development sixty days prior to enactment of the subdivision codes. This is a claim of a failure to act and does not require the same measure of standing. The Petitioners have adequate standing. The fact the Petitioners added comments or argument in addition to the issue is not fatal to standing. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order On Motions; (Apr. 23, 2001).

- RCW 36.70A.280(2)(b) provides that: " a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; has standing to file a Petition for Review before the Board." The Petitioners contends they have 11 letters listed in the Index regarding the Critical Areas Ordinance. They attached 7 of those letters to the memorandum opposing Stevens County's motion to dismiss. These letters are dated over a period of time from December 28, 1998 through February 8, 2000. The Petitioners also point out the letters do reflect the many meetings they attended and the oral comments given to the County. The Petitioners demonstrated they have participated orally and in writing before the County Commissioners and should be deemed to have standing on Issues #3, 7, 8, 9, 10, 11 and 12. *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Order on Motions, May 16, 2001.

- The Petitioners contend the Growth Management Act does not require issue specific standing. They believe the specific issue raised in their Petition need not be raised before the County Commissioners. As the Board stated in Loon Lake Property Owners, et al. v. Stevens County, Case No. 01-1-0002c Order on Motions dated April 23, 2001, page 4, "The GMA does not require issue specific standing. The GMA, as interpreted by the Court of Appeals, requires only that the Petitioner's participation be reasonably related to the issue presented to the Board (Wells v. Hearings Board, 100 Wn App. 656 (2000)".

  The Petitioners have given us detailed instances where they have participated through letters to the County Commissioners on matters related to the wetland issues raised by their Petition. They have also asserted that they have participated orally at hearings concerning these issues. The Petitioners have provided adequate evidence to substantiate their standing on issues 3, 5, 7, 8, 9, 10, 11 and 12. . *Larson Beach Neighbors and Jeanie Wagenman v. Stevens County*, EWGMHB 00-1-0016 Order on Motions, May 16, 2001.

State Environmental Policy Act (SEPA)

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State Environmental Policy Act (SEPA) determination, is determined by a two-part test: (1) The Petitioner must be within the zone of interest protected by SEPA, and (2) the party must allege an injury in fact, i.e., that he or she will be specifically and perceptibly harmed by the proposed action and the injury will be immediate, concrete, and specific. *Leavitte v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

  In order to show "injury in fact," a party must present testimony or affidavits indicating that it will be adversely affected by a municipal government's decision under SEPA. If the

alleged injury is merely conjectural or hypothetical, then there can be no standing. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- To show injury in fact, the Fire District must demonstrate that it will be specifically and perceptibly harmed by the proposed action. A claim of potential injury without supporting evidentiary facts is insufficient to establish standing**.** When the entity seeking standing alleges a threatened injury, rather than an existing injury, it must show an immediate, concrete, and specific injury to itself. A showing of conjectural or hypothetical harm is insufficient to establish injury in fact. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Final Decision and Order, July 31, 2003.

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10, a municipal corporation, v. City of Airway Heights, Respondent and City of Spokane, Intervenor,* EWGMHB, 02-1-0019, Order on Motion to Dismiss SEPA Issues, July 31, 2003.

- The Washington State Legislature granted the Growth Management Hearings Boards jurisdiction to hear matters relating to RCW 43.21 (SEPA) as it relates to plans, development regulations or amendments adopted under the GMA. The Board recognizes that the Petitioners actively participated in the joint hearing process where the EIS and the Comprehensive Plan was discussed. This together with the careful reading of WAC 197-11-545(2) in full and our liberal examination of standing, we find that the Petitioners have standing to challenge the adequacy of the EIS herein. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The EIS performed was adequate for a non-project EIS. The Board finds the law does not require the examination of each and every potential option. The contents of the EIS on non-project proposals are described in WAC 197-11-442. That code provision declares that the County "shall have more flexibility in preparing EISs on non-project proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents . . .." WAC 197-11-442(1). *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County has flexibility in preparing the non-project EIS for the Comprehensive Plan. WAC 197-11-443(2) provides that a "non-project proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed consistent with the approved non-project action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the non-project EIS. The scope shall be limited accordingly..." *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County,* EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The County further argues that the challenged amendments were within the range of alternatives considered in the environmental impact statement (EIS) prepared pursuant to the State Environmental Policy Act (SEPA) and simultaneous with the development of the Comprehensive Plan. Therefore the County was not required to provide additional opportunities for public comment pursuant to RCW 36.70A.035(2)(b)(i).

- Again, this Board cannot agree with the County. The alternatives were discussed only generally in the environmental impact statement and do not approach the specificity required that would have alerted interested members of the public that the challenged amendments would be considered and adopted with the Comprehensive Plan. We therefore find that the 72 amendments were not within the range of alternative addressed in the environmental impact statement. *1000 Friends of Washington and Neighborhood Alliance of Spokane, v. Spokane County,* EWGMHB 01-1-0018, Final Decision and Order, (June 4, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. City of Walla Walla, *Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County,* EWGMHB, 02-2-0012c, Second Motion Order, (August 27, 2002).

- The use of previously prepared documents in this process was appropriate and not a violation of the GMA or SEPA. The shortened process was to avoid duplication and was designed for a time such as this where most of the work had already been done. *Saundra Wilma and Alan D. Wilma, v. City of Colville,* EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The City does not contend that it considered alternatives as is required. This GMA action was to change the zoning of the subject parcel of land to Commercial. It is not project specific and is site specific. The range of alternatives is restricted. The major alternative was no action. Detailed options that deal with the specific project of Wal-Mart are being dealt with at the permitting stage. *Saundra Wilma and Alan D. Wilma, v. City of Colville,* EWGMHB, 02-1-0007, Final Decision and Order, (September 4, 2002).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. Counties critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *Merrill H. English and Project for Informed Citizens v. Board of County Commissioners of Columbia County,* EWGMHB 93-1-0002, Final Decision and Order (Nov. 12, 1993).

- In 1995, the Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA as part of regulation reform legislation (RCW 36.70A.280). The stated purpose was to simplify regulatory compliance. Standing for issues before this Board is under the GMA and Cascade Columbia Alliance has adequately demonstrated standing.

  The Board finds that standing under the GMA is sufficient standing to raise SEPA issues before this Board. This decision concurs with the ruling of the Western Washington Growth Management Hearings Board in Achen, et al. v. Clark County WWGMHB No. 95-2-0067. *Cascade Columbia Alliance, v. Kittitas County*, **(Cascade Columbia Alliance)** Case No. 98-1-0007, Order on Motions, (3-1-99).

- The fact that the Petitioners appealed the SEPA matter to the Hearing Examiner does not render this issue *res judicata.* After such appeal they could have chosen to appeal to the Superior Court or the Growth Management Hearings Board. They chose to seek review before this Board. That is authorized under the GMA. RCW 36.70A.280(1). 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order On Motions; (Apr. 23, 2001).

- In 1995, the Washington State Legislature expanded the Growth Management Hearings Board's jurisdiction to include SEPA actions taken to comply with the GMA. There is nothing in RCW 36.70A.280(1) that indicates a legislative intent to treat standing requirements for a SEPA challenge different than any other GMA standing requirement. The Hearings Board has no authority in the GMA to engraft a different and more rigorous standing requirement for SEPA challenges than that which is set forth in the plan language of the statute. The cases cited by the County do not apply to the question of whether a person with "appearance standing" may bring a SEPA challenge under the GMA. We find no reason to change our belief that standing for all issues raised before this Board should be measured by the requirements of the GMA, RCW 36.70A.280(2)(b). 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Order On Motions; (Apr. 23, 2001).

- The Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA. (RCW 36.70A.280). The Board has jurisdiction to review the non-project specific County actions. The Board must determine if the EIS performed for these actions was adequate. Less detail is required for an EIS on a non-project action. WAC 197-11-704(2)(b)(ii). A specific project shall undergo a much more rigorous SEPA review. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

Stipulation

- Because the primary issue concerned the County's failure to designate agricultural resource lands in a timely manner pursuant to RCW 36.70A.170, which the County admitted it had not done, a stipulation setting an agreed upon deadline for the performance of this action was entered into by the parties and memorialized in the Board's "Stipulated Agreement and Final Decision and Order" dated June 22, 1994. Since this stipulation resolved the matter at hand, the development of a record for this case was deemed unnecessary and none was produced. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 94-1-0019, Order of Compliance (Oct. 21, 1994).

Subarea Plans

- The Board finds that the GMA establishes the Countywide Planning Policies ("CPPs") as the mechanism for achieving consistencies between the comprehensive plans of a county and the cities within that county. RCW 36.70A.210(1) provides a CPP "shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100." The Board has already ruled that the MPR Policies are consistent with the CPPs. *City of Ellensburg v. Kittitas County,* EWGMHB No. 96-1-0017. The Board is not asked whether the MountainStar Subarea Plan is consistent with the CPPs, but with the City of Roslyn. We find that if the MountainStar Subarea Plan is consistent with the CPPs, it is inherently consistent with the comprehensive plan for the City of Roslyn. No one has challenged the consistency of the Roslyn Comprehensive Plan with the CPPs.

- RCW 36.70A.360(1) defines a MPR as a type of "planned unit development." The County has a zoning ordinance for planned unit developments, KCC 17.08.445. A process is established therein for the assessment of a PUD application. Instead of using this process for siting a MPR, the County established a Subarea Plan and a MPR Zoning District, which includes the process for establishing a MPR. A MPR cannot be zoned under both the MPR Zoning District and the PUD provisions. Both are separate and distinct zoning districts under the Kittitas County Code. 00-1-0017: Ridge v. Kittitas County, et. al.; Final Decision and Order; (Jun. 7, 2001).

Subject Matter Jurisdiction

- The Board does not have jurisdiction to review local government compliance with statutes other than the Growth Management Act and SEPA compliance on GMA plans and regulations. Similarly, the Board has no authority to impose a moratorium, to set aside permits, or to enjoin construction. RCW 36.70A.300 limits the type of relief a Board can grant to either finding a county in compliance or not in compliance with the Act. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment,* EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that its jurisdiction extends only to matters specified in RCW 36.70A.280 (1). Therefore, the Board lacks jurisdiction to determine whether a county violated other statutes. *North Cascades Conservation Council and Washington Environmental Council v. Chelan County Board of Adjustment,* EWGMHB 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- A Growth Management Hearing Board does not have the jurisdiction to review an action of a County pursuant to a non-GMA statute unless that statute was used to comply with the requirements of the GMA. However, the Board has jurisdiction to determine if a land use planning legislative action complies with the GMA, as long as there is a sufficient nexus between the action and the GMA. The Board's jurisdiction is not to determine whether the local government has properly enacted such non-GMA law, but the effect of the law passed upon the County's compliance with the GMA. *Concerned Friends of Ferry County v. Ferry County,* **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion to Dismiss, (9-29-99).

- When we review Ferry County Ordinance #99-01, we will not determine if the county is in compliance with the Washington Forest Practices Rules, WAC 222-20-050, but examine this action to determine whether the County remains in compliance with the GMA. To do

otherwise would allow the myriad of other planning statutes to dramatically affect a County's Comprehensive Plan with no checks. *Concerned Friends of Ferry County v. Ferry County*, **(Concerned Friends v. Ferry County)** Case No. 99-1-0004, Order on Motion to Dismiss, (9-29-99).

Summary Judgment

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, Loon Lake Defense Fund, William Shawl, and Janice Shawl, Larson Beach Neighbors, and Jeanie Wagenman, v. Department of Ecology, Intervenor and Stevens County*, EWGMHB, Case No. 03-1-0006c, Order on Motions on cases NOS. 00-1-0016, 03-1-0003, AND 03-1-0006, February 6, 2004.

- Dispositive motions before the Growth Management Hearings Board are similar to a motion for summary judgment in Superior Court. WAC 242-02-530. A dispositive motion must be based upon uncontested material facts. If there is a dispute as to any material facts, the Board will not grant the motion to dismiss. *City of Cle Elum v. Kittitas County, et al*, EWGMHB 01-1-0003, Order on Motions, April 19,2001.

Transportation

- The road plan, adopted by the ordinance, effectuates the goal of placing collector roads away from areas already developed with residences. The ordinance does not encourage urban development without adequate facilities. *Milo and Donna Bauder v. City of Richland, a municipal corporation,* EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

- The location of a road or primary access road, which is not upon the subject property, does not place the City in non-compliance. The location or relocation of a road in a city or county can affect landowners near and far. An action under the GMA is not prohibited by Goal 6 simply because the action has an effect upon people's property. While the subject change appears to have a substantial impact upon access to and the timing of the access to the Petitioners' development, that alone does not make the action of the City non-GMA compliant. The actions of the City are presumed to be in compliance with the GMA. The Petitioners have not shown this Board that the actions of the City are in clearly erroneous and a violation of the GMA. *Milo and Donna Bauder v. City of Richland, a municipal corporation,* EWGMHB 01-1-0005 Final Decision and order (August 16 2002).

Urban Densities

The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the

most difficult to bring into a city if annexed. City of Moses Lake v. Grant *County*, EWGMHB, 99-1-0016, Order on Remand, (April 17, 2002).

Urban Growth Areas (UGAs)

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the FUGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- The Act does not prohibit the reasonable inclusion of land over and above the acreage necessary to accommodate the twenty-year growth projection. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- The size of an urban growth area should equal the area required under the OFM growth projection plus the area required by legitimate factors, reasonably evaluated and quantified, needed to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty-years. This definition allows a jurisdiction to achieve its legitimate needs, while prohibiting sprawl. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB 94-1-0001, Final Decision and Order (Jul. 1, 1994).

- There are a variety of factors that each community should consider and evaluate in the process of designating an urban growth area. The precise set of factors will depend upon the particular circumstances of each community. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- The Board reaffirms that the size of an urban growth area should equal the area required under the OFM growth projection plus the area required to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty years. This definition allows a community to achieve its legitimate needs, while prohibiting sprawl. The Board holds that this is the meaning of RCW 36.70A.110(2). *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB 94-1-0023, Final Decision and Order (Apr. 25, 1995).

- RCW 36.70A.110(2) requires counties to "attempt to reach agreement with each city on the location of an urban growth area within which the city is located. If such an agreement is not reached with each city located within the urban growth area, the county shall justify in writing why it so designated the area an urban growth area." Nowhere does the law require the same for a disagreement as to the uses to be allowed in such UGAs. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, Final Decision and Order (Dec. 10, 1996).

- Cities are the focal points for growth. The Act intends growth will be centered on cities. Thus, the boundaries of a UGA and the city limits of existing municipalities will be identical, assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years.

Knapp, et al. v. Spokane County, EWGMHB 97-1-0015c, Final Decision and Order (Dec. 24, 1997).

- Counties planning under the GMA are required to designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if is not urban in nature. RCW 36.70A.110. This is one of the fundamental requirements of the GMA.

  The first requirement listed above is key to the UGA concept. Cities are the focal points for growth. The GMA intends growth will be centered on cities. Thus, the boundaries of a UGA and the City limits of existing municipalities will be identical, assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years.

  The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the GMA but also have a great deal of flexibility to make choices in complying. As an example of a mandate, the GMA establishes population-planning projections upon which IUGAs must be based. The Office of Financial Management (OFM) makes these exclusive projections for each County; no discretion is permitted for local jurisdictions to use their own numbers.

  On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. Thus, counties, as regional governments, must choose how to configure IUGAs to accommodate the forecasted growth consistent with the goals and requirements of the GMA. Cities also have discretion in deciding specifically how they will accommodate the growth allocated to them by the County, consistent with the goals and requirements of the GMA.

  It must be pointed out the exercise of discretion is crucial. For example, just because an area adjacent to a City is characterized by urban growth does not impose a requirement this territory be included within an IUGA, unless existing cities cannot accommodate the additional projected growth and it is otherwise an appropriate location for such growth. The consequence of existing urbanized areas outside cities not being included within an IUGA is simply that new urban development will not be permitted in those areas. Existing uses and improvements may continue, subject to applicable laws. While an area falling within one of the rank order exceptions listed above may be included within IUGAs, it is not mandatory it be included.

  The IUGA is, as the City contends, a step in the development of the FUGA and the Comprehensive Plan. The Washington State Legislature amended the GMA to add IUGAs due to a stated fear inappropriate urban development could occur unless an IUGA is designated prior to the final passage of the Comprehensive Plan and the FUGA. The IUGA is a placeholder. The IUGA can be modified as additional information is obtained through the development of the Comprehensive Plan. *Kenneth and Sandra Knapp et. al., v. Spokane County*, (**Spokane County**), EWGMHB Case No. 97-1-0015c, Order on Fourth Compliance Hearing, (8-23-99).

- RCW 36.70A.110 requires planning cities and counties to designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. The city itself must be included within an UGA. Sub-

paragraph (2) of that section directs the County to include areas and densities sufficient to permit the urban growth that is projected to occur in the city for the succeeding twenty-year period. This projection was prepared by OFM. OFM establishes a range of population projections rather than a single figure. The projections include a more likely population scenario (medium) and a high and a low. The county would not be out of compliance with the GMA if it used any number within the range. AN UGA determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. "In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth." RCW 36.70A.110(2). 99-1-0013; Bert *and Gayle Bargmann v. Grant County*; Final Decision and Order; (May 19, 2000).

The proper sizing and location of an UGA involves more than a simple mathematical analysis. A county, in sizing UGAs, appropriately considers many other factors. RCW 36.70A110(2) directs a county to establish an UGA boundary "sufficient to permit" urban growth projections. The County must use GMA's planning goals to guide the development and adoption of the UGA. One of the primary purposes of the Act is to avoid sprawl and direct new growth into UGAs.). 99-1-0013; *Bert and Gayle Bargmann v. Grant County;* Final Decision and Order; (May 19, 2000).

- The requirement that each existing city must be within an UGA is key to the UGA concept. Cities are the focal points for growth. The Act intends growth to be centered on cities. Thus, the boundaries of an UGA and the city limits of existing municipalities will be identical; assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years.

  Local jurisdictions have a great deal of discretion in deciding how to accommodate these projections in light of local circumstances and traditions. The Cities have the discretion in deciding specifically how they will accommodate the growth allocated to them by the county consistent with the goals and requirements of the Act. 99-1-0013; Bert *and Gayle Bargmann v. Grant County*; Final Decision and Order; (May 19, 2000)

- Expansive UGAs violate the goals and requirements of the GMA because they allow development in areas that would be prohibited within correctly sized UGAs. The existing city limits of Ephrata contain more available lands than needed to accommodate the expected growth in the next 20-year period. This was true even though the City and the County used the highest estimate of population growth, reduced the available lands by 60% reduction factor and increased the population by a 25% market factor. 99-1-0013: *Bert and Gayle Bargmann v. Grant County;* Final Decision and Order; (May 19, 2000)

- The GMA allows great discretion to each jurisdiction in their designation of an UGA. This discretion allows the County/City to adopt the urban density and commercial and industrial location desired by that jurisdiction. However this vision of urban development must be exercised within the sideboards of the GMA and its goals. 99-1-0013*: Bert and Gayle Bargmann v. Grant County*; Final Decision and Order; (May 19, 2000)

Urban Growth

- The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside IUGAs or UGAs. Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other

agricultural products, or fiber, of the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…." (RCW 36.70A.030(7)). 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001)

- Permitting minimum lot sizes of 2.5 acres throughout the County would encourage sprawl and not protect resource lands, critical areas and the rural nature of the non-urban areas in Stevens County. The fact that certain restrictions apply to the siting of such small lots is not enough. During the interim period where there is no comprehensive plan, critical area protections, or resource lands designation, the protection offered by these Short and Long Plat Resolutions is insufficient. 99-1-0001c: Saundra Wilma and Alan C. Wilma, et al v. Stevens County; Order On Second Compliance Hearing; (Mar. 14, 2001),

- The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside IUGAs or UGAs. Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…." (RCW 36.70A.030(7)).

  Permitting minimum lot sizes of 2.5 acres and exemptions and variances allowing even smaller lots throughout the County would encourage sprawl and not protect resource lands, critical areas and the rural nature of the non-urban areas in Stevens County. The fact that certain restrictions apply to the siting of such small lots is not sufficient to achieve the goals of the GMA. During the interim period where there is no Comprehensive Plan, compliant Critical Area ordinance or Resource Lands designation, the protection offered by these short and long plat regulations is insufficient. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…" To determine whether the County is in violation of this provision and the goals of the GMA this Board looks not only at the minimum lot size listed, but also any exemptions or variances that would allow different lot sizes in the rural areas of the County.

  While exemptions and variances are common, they need to be strictly enforced and standards must be developed to insure that the exemptions and variances are allowed only where they do not interfere with the goals of the GMA. Because the County has not adopted a comprehensive plan and the required elements contained therein, the interim regulations prohibiting urban growth in rural areas are needed to preserve the rural character of that area until the comprehensive plan decisions have been made. The exemptions and variances listed in the Platting Ordinances can be applied throughout the rural areas and lack standards. Variances can easily be granted, further encouraging sprawl prior to the adoption of the County's Comprehensive Plan. 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- The Boards have held that five-acre lots in rural areas of a county will be subject to "increased scrutiny" by the Board to assure, among other things, that the number, location,

and configuration do not constitute urban growth. In the Matter of the Petition of Peter E. Overton for a Declaratory Ruling, CPSGMHB Case No. PDR 96-3-0001, February 36, 1996 (Notice of Decision Not to Issue Declaratory Ruling) 1996 WL 650335, at *3-*5. But five-acre lots are not per se violative of the GMA. The subject interim ordinance limits both the number and the location of five-acre lots in rural areas and is interim in nature. The interim ordinance allows fully 88 percent of the rural area within the County to be zoned for lot sizes of twenty acres or larger. Further a moratorium on development is placed upon industrial and commercial development presently totaling 11,360 acres. *City of Moses Lake v. Grant County,* EWGMHB 01-1-0010, Final Decision and Order, November 20, 2001.

Urban Services

- RCW 36.70A.020(1)(2) states as follows:

  (1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
  (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

  …

  Consistent with these Planning goals, the Legislature explained, "In General, Cities are the units of local government most appropriate to provide urban governmental services. …"

  RCW 36.70A.110(4). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The Western Washington Growth Management Hearings Board (WWGMHB), Case No. 97-2-0060, *Abenroth, et al. v. Skagit Co.,* held it is inappropriate to establish a non-municipal UGA in close proximity to a municipality with no plan for the transformance of governance. Annexation and incorporation of urban areas within UGAs are the means to achieve this transformation of local governance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, 1000 Friends of Washington and City of Walla Walla, v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, Final Decisions and Order (May 1, 2002).

- The City of Spokane is the largest city in Eastern Washington and has shown they can and do provide urban services to areas outside their UGA. It makes sense that the City should have room to grow. They have shown that they can handle, along with special purpose districts, the services needed. Both the GMA and Board decisions reflect that urban governmental services should be provided by the cities. The City of Spokane has shown it can provide those services. The Board finds the County has acted erroneously in excluding the City from joint planning in the North Metro Area. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

- Extending city services into rural areas of the county encourage urban growth. This is a reason why the legislature prohibited the provision of those services in rural areas except for where it can be shown to be necessary to protect the basic health and safety. That is not the

case here. The Board has found Titles 4 and 5 out of compliance. Those titles encourage urban densities in rural areas. The county must bring them into compliance. Part of the solution is to not allow the provision of urban services in the rural areas. RCW 36.70A.030. . 01-1-0002c: Loon Lake Property Owners Association, et al v. Stevens County; Amended Final Decision and Order (October 26, 2001).

- The Board recognizes it may be more expensive to provide urban services to 1-acre densities but it is not a hindrance for annexation. While it may be more expensive for the homeowner, it should not be more expensive for the City or County. One-acre lots in cities and Urban Growth Areas are not prohibited by the GMA. The County has discretion when establishing densities, as long as the Goals of the GMA are not frustrated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB, 02-1-0001, Final Decision and Order, (July 3, 2002).

Water

- The GMA directs counties to designate, classify and protect areas with a "critical recharging effect on aquifers used for potable water." It is necessary to determine the location of recharge areas as a first step in designating and protecting them. The county must provide criteria necessary to indicate when an area needs specific scientific analysis to determine whether it is a critical aquifer recharge area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Compliance Hearing Order (Apr. 8, 1999).

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- While any Reclamation water does not serve this land, this Board has found in several cases that agricultural land of long-term significance does not have to be irrigated lands. This Board has stated that junior water rights and non-irrigated lands can be as productive if not more productive than lands that are irrigated. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton*, EWGMHB, 02-1-0008, Final Decision and Order, (November 4,2002).

- The Board has already found senior water rights were not a valid criterion in designating agricultural lands where the evidence did not show a significant difference in productivity. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The GMA dos not require water, sewer, and other services to be in place until development occurs. We require the cities to provide these facilities and services at least concurrently with the projected growth. *Cascade Columbia Alliance v. Kittitas County*, EWGMHB 98-1-0004, Final Decision and Order (Dec. 21, 1998).

Wetlands

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available

science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd*., 96 Wn. App. 522, 532, 979 P.2d 864 (1999). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor,* EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The Intervenor, the Washington State Department of Ecology, DOE, intervened and argued two issues. The DOE argued that the County's Critical Areas Ordinance is inconsistent with the Growth Management Act because it defines wetlands to exclude wetlands created by road and railroad construction prior to 1990; and that Stevens County's CAO is inconsistent with best available science because it excludes small wetlands from critical areas protections.

  Stevens County concedes in their brief that Title 13 fails to adequately define wetlands, erroneously excluding wetlands created by construction of roads or railroads prior to 1990, in violation of RCW 36.70A.030(20). Stevens County also concedes it has erroneously excluded exempted wetlands in Categories 2 and 3 containing less than 2500 square feet and category 4 wetlands containing less than 10,000 square feet, from Title 13, thus failing to meet the requirements of the GMA to protect critical areas, RCW 36.70A.170(d), utilizing best available science, RCW 36.70A.172. *Larson Beach Neighbors and Jeanie Wagenman, v. Stevens County, and Department of Ecology, Intervenor*, EWGMHB, Case No. 03-1-0003,Final Decision and Order, February, 10, 2004.

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). Counties should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- High quality and/or particularly vulnerable wetlands require greater protection that lowers quality or less vulnerable wetlands. In order to provide the minimum level of protection for high quality wetlands, one of two approaches is necessary. Either all wetlands must be protected at a level necessary to protect wetlands requiring the greatest level of protection or a rating system can be used to differentiate wetlands of various quality levels and then protections can be accorded in relation to the need of each particular quality level. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a county has a range of discretion as to how exactly that level is met. To the extent a county relies on other statutes as part of its protection scheme, they

should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB 94-1-0021, Final Decision and Order (Mar. 10, 1995).

- Counties may use the National Wetlands Inventory as an information source for determining the approximate distribution and extent of wetlands. Counties should consider using the methodology in the Federal Manual for identifying and delineating jurisdiction wetlands, cooperatively produced by the U.S. Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Soil Conservation Service and the United States Fish and Wildlife Service, that was issued in 1989, and Regulatory Guidance Letter 90-7 issued by the United States Corps of Engineers on November 29, 1990 for regulatory delineations. *Moore v. Whitman County*, EWGMHB 95-1-0002, Final Decision and Order (Aug. 16, 1995).

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

  The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* **(Ferry County),** EWGMHB Case No. 97-1-0018, Order on Compliance, (9-30-99).

- Many of the same problems identified for Section 500, above, exist here. The standard buffer widths are too narrow. Any adjustments to these buffers must begin from a point where all the wetlands will be protected. The individual adjustments may then be considered. The best available science was not included here in a substantive way.

  The exemptions found in subsection 5, the Administrative Variance in subsection 12 and the notice and appeal provisions have the same problems here as identified above in Section 500. However, subsection 13, the Modification Provisions for Existing Lots, does not have the same defect found in the Fish and Wildlife ordinance, Section 500. This section limits the eligible lots to those existing prior to the passage of this ordinance. Save Our Butte, Save Our Basin Society, et. al., v. Chelan County **(Chelan County),** EWGMHB Case No. 94-1-0015, Order on Compliance, (4-8-99).

Zoning

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has by adopting these density levels created different classes of

property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II, a Washington limited Partnership v. Kittitas County*, EWGMHB 01-1-0017, Final Decision and Order. (March 14, 2002).

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled to find the County is out of compliance. King County, in that case, greatly limited the uses, prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.

  In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of he Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." Id p. 142. The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" id p.142. The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Id p. 142. Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- RCW 36.70A.400 states that any local government that is planning under the Housing Policy Act shall comply with RCW 43.63A.215(3). The Board finds that RCW 43.63A.215, when read as a whole, requires local governments to adopt development regulations, zoning regulations or official controls that provide for accessory dwelling units in areas zoned for single-family residential use by December 31, 1994. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB 95-1-0001, Dispositive Motion and Final Order (Jun. 6, 1995).

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The Superior Court of Walla Walla County remanded to this Board a portion of the Final Decision and Order in *City of Walla Walla v. Walla Walla County*, No. 02-1-0012c. This Board was directed by the court to "make findings as to any legal or factual basis for not allowing use of Walla Walla County's CUP process in making such threshold determinations, including whether the mandated conservation, maintenance, and enhancement of the agricultural industry is being complied with, and whether any 'innovative zoning techniques' under RCW 36.70A.177 are applicable." (Walla Walla County Superior Court, *Walla Walla County v. Eastern Washington Growth Management Hearings Board*, No. 02-2-00784-9, April 21, 2003). The Board is to consider whether the County's use of its CUP process and its standards to make a "threshold" decision on the siting of these challenged uses, protects agricultural lands of long-term commercial significance such that the regulations comply with the GMA. The Board finds that it does not. *CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON, Petitioner v. WALLA WALLA COUNTY,* Case No. 02-1-0012c Order on Remand, 16th day of December 2003.

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." P.143.
  As in the King County case above, we find here " the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra,* P.142.

  While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, Citizens for Good Governance and 1000 Friends of Washington, v. Walla Walla County*, EWGMHB, 02-2-0012c, Final Decision and Order, (November 26, 2002).

- The important concern is the non-agricultural impact of non-exclusive zoning, by which we mean the cumulative impact of non-agricultural related activities on the designated agricultural area. In many cases it is a proposed development's level of impact and purpose that is determinative of whether it should be allowed or not. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, Final Decision and Order (May 7, 1996).

Appendix A - Glossary of Acronyms

ADU	Accessory Dwelling Units
AMIRD	Areas of More Intense Rural Development
APA	Administrative Procedures Act
ARA	Aquifer Recharge Areas
BAS	Best Available Science
BMP	Best Management Practice
BOCC	Board of County Commissioners
CA	Critical Area
CAO	Critical Areas Ordinance
CARA	Critical Aquifer Recharge Area
CFE	Capital Facilities Element
CO	Compliance Order
CP	Comprehensive Plan
CPP	Countywide Planning Policy
CTED	Community, Trade & Economic Development, Department of
DOE	Department of Ecology
DNS	Determination of Nonsignificance
DR	Development Regulation
EIS	Environmental Impact Statement
EPF	Essential Public Facility
FCC	Fully Contained Community
FDO	Final Decision and Order
FEIS	Final Environmental Impact Statement
FFA	Frequently Flooded Area
FWH	Fish and Wildlife Habitat Conservation Areas (FWHCA)
GHA	Geologically Hazardous Area
GMA, Act	Growth Management Act
GMHB	Growth Management Hearings Board
HMP	Habitat Management Plan
ILA	Interlocal Agreement
ILB	Industrial Land Bank
IUGA	Interim Urban Growth Area
LAMIRD	Limited Areas of More Intensive Rural Development
LOS	Level of Service
LUPP	Lands Useful for Public Purposes
MCPP	Multi-County Planning Policies
MPR	Master Planned Resort
MO	Motion Order
NRL, RL	Natural Resource Land, Resource Land
OFM	Office of Financial Management
PFR	Petition for Review
PHS	WA Dept. of Fisheries and Wildlife Priority Species and Habitat Manual
PUD	Planned Unit Development
RAID	Rural Areas of Intense Development
RO	Reconsideration Order
SCS	Soil Conservation Service
SEPA	State Environmental Policy Act
SMA	Shoreline Management Act
SMP	Shoreline Master Program
TDR	Transfer of Development Rights
TMZ	Traffic Management Zone
UGA	Urban Growth Area

Appendix B - GMA Legislative History

1990
Laws of 1990, 1st Ex. Sess., ch. 17

1991
Laws of 1991, ch. 322
Laws of 1991, Sp. Sess., ch. 32

1992
Laws of 1992, ch. 207
Laws of 1992, ch. 227

1993
Laws of 1993, Sp. Sess., ch. 6
Laws of 1993, ch. 478

1994
Laws of 1994, ch. 249
Laws of 1994, ch. 257
Laws of 1994, ch. 258
Laws of 1994, ch. 273
Laws of 1994, ch. 307

1995
Laws of 1995, ch. 49
Laws of 1995, ch. 190
Laws of 1995, ch. 347
Laws of 1995, ch. 377
Laws of 1995, ch. 378
Laws of 1995, ch. 382
Laws of 1995, ch. 399
Laws of 1995, ch. 400

1996
Laws of 1996, ch. 167
Laws of 1996, ch. 239
Laws of 1996, ch. 325

1997
Laws of 1997, ch. 382
Laws of 1997, ch. 402
Laws of 1997, ch. 429

1998
Laws of 1998, ch. 112
Laws of 1998, ch. 171
Laws of 1998, ch. 249
Laws of 1998, ch. 286
Laws of 1998, ch. 289

1999
Laws of 1999, ch. 315

2000
Laws of 2000, ch. 36
Laws of 2000, ch. 196

2001
Laws of 2001, 2nd sp. Sess., ch. 12
Laws of 2001, ch. 326

2002
Laws of 2002, ch. 68
Laws of 2002, ch. 212
Laws of 2002, ch. 154
Laws of 2002, ch. 320
Laws of 2002, ch. 306

Appendix C - Court Decisions

2002

Each case listed contains the following:
Case Name, Case Number, Wash Cite (*if available)*, Pacific Reporter Cite (*if available)*, WL Cite (*if there is no Pacific Reporter cite)*, LEXIS Cite.
***Indicates that the case is already listed in the digest, but this list has the correct citations.

Timberlake Christian Fellowship v. King County, (NO. 49824-0-I), 2002 WL 31117270 (Wash.App. Div. 1, Sep 23, 2002), 2002 Wash. App. LEXIS 2387, September 23, 2002, Filed.
City of Burien v. Central Puget Sound Growth Management Hearings Bd., (NO. 27560-1-II), 53 P.3d 1028 (Wash.App. Div. 2, Sep 13, 2002), 2002 Wash App. LEXIS 2218, September 13, 2002, Filed.
Chelan County v. Nykreim, (NO. 71067-8), 146 Wash.2d 904, 52 P.3d 1 (Wash., Jul 25, 2002), 2002 Wash. LEXIS 481, January 17, 2002, Argued, July 25, 2002, Filed.
Isla Verde Intern. Holdings, Inc. v. City of Camas, (NO. 69475-3), 146 Wash.2d 740, 49 P.3d 867 (Wash., Jul 11, 2002), 2002 Wash. LEXIS 468, July 11, Filed.
Holbrook, Inc. v. Clark County, (NO. 27216-4-II), 112 Wash.App. 354, 49 P.3d 142 (Wash.App. Div. 2, Jun 28, 2002), 2002 Wash. App. LEXIS 1493, June 28, 2002, Filed.
Mossano v. Kitsap County, (NO. 26696-2-II), 112 Wash.App. 1029, 2002 WL 1398059 (Wash.App. Div. 2, Jun 28, 2002), 2002 Wash. App. LEXIS 1498, June 28, 2002, Filed.
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Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, (NO. 70090-7, 70499-6), 145 Wash.2d 702, 42 P.3d 394 (Wash., Mar 14, 2002), 2002 Wash. LEXIS 178, March 20, 2001, Oral Argument, March 14, 2002, Filed.
Grandmaster Sheng-Yen Lu v. King County, (NO. 47647-5-I), 110 Wash.App. 92, 38 P.3d 1040, 2002 Wash. App. LEXIS 148, January 28, 2002, Filed.
Jensen v. City of Everett, (NO. 47077-9-I), 109 Wash.App. 1048, 2001 WL 1637744 (Wash.App. Div. 1, Dec 17, 2001), 2001 Wash. App. LEXIS 2749, December 17, 2001, Filed. UNPUBLISHED OPINION.

Wilma v. Stevens County Convassing Bd., (NO. 17354-2-III), 109 Wash.App. 1042, 2001 WL 1572433 (Wash.App. Div. 3, Dec 11, 2001), 2001 Wash. App. LEXIS 2692, December 11, 2001, Filed. UNPUBLISHED OPINION.
****North Kitsap Coordinating Council v. Kitsap County*, (NO. 46624-1-I), 108 Wash.App. 1028, 2001 WL 1155774 (Wash.App. Div. 1, Oct 01, 2001), 2001 Wash. App. LEXIS 3009, October 1, 2001, Decided, Reported in Full-Text Format at: 2001 Wash. App. LEXIS 2232.
****The Cooper Point Ass'n v. Thurston County*, (NO. 26425-1-II), 108 Wash.App. 429, 31 P.3d 28 (Wash.App. Div. 2, Sep 14, 2001), 2001 Wash. App. LEXIS 2082, September 14, 2001, Filed, Review or Rehearing granted: 2002 Wash. LEXIS 203, April 2, 2002.
Alberg v. King County, (NO. 44893-5-I, 45554-1-I, 45951-1-I), 108 Wash.App. 1005, 2001 WL 1011935 (Wash.App. Div. 1, Sep 05, 2001), 2001 Wash. App. LEXIS 2083, September 4, 2001, Filed. UNPUBLISHED OPINION. Petition for Review Denied June 4, 2002, Reported at: 2002 Wash. LEXIS 352.
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****Somers v. Snohomish County*, (NO. 41710-0-I), 105 Wash.App. 937, 21 P.3d 1165 (Wash.App. Div. 1, Apr 23, 2001), 2001 Wash. App. LEXIS 836, April 23, 2001, Filed.
****Citizens for Responsible and Organized Planning (CROP) v. Chelan County*, (NO. 17795-5-III), 105 Wash.App. 753, 21 P.3d 304 (Wash.App. Div. 3, Apr 10, 2001), 2001 Wash. App. LEXIS 586, April 10, 2001, Filed.
****MOAB Irr. Dist. No. 20 v. State Boundary Review Bd. for Spokane County*, (NO. 19186-9-III), 105 Wash.App. 1029, 2001 WL 293137 (Wash.App. Div. 3, Mar 27, 2001), 2001 Wash. App. LEXIS 1221, March 27, 2001, Decided, DECISION WITHOUT PUBLISHED OPINION.
****Lane v. Central Puget Sound Growth Management Hearings Bd.*, (NO. 46773-5-I), 105 Wash.App. 1016, 2001 WL 244384 (Wash.App. Div. 1, Mar 12, 2001), 2001 Wash. App. LEXIS 1025, March 12, 2001, Decided, DECISION WITHOUT PUBLISHED OPINION.
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****Moore v. Whitman County*, (NO. 69053-7), 143 Wash.2d 96, 18 P.3d 566 (Wash., Feb 22, 2001), 2001 Wash. LEXIS 140, June 2, 2000, Argued, February 22, 2001, Filed.

2001

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1999

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Diehl v Mason County, No. 22540-9-II, COURT OF APPEALS OF WASHINGTON, DIVISION TWO, 94 Wn. App. 645; 972 P.2d 543; 1999 Wash. App. LEXIS 429, March 5, 1999, Filed

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1998

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1997

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1996

Postema v. Snohomish County, No. 37389-7-I, COURT OF APPEALS OF WASHINGTON, DIVISION ONE, 83 Wn. App. 574; 922 P.2d 176; 1996 Wash. App. LEXIS 356, September 9, 1996, FILED, Petition for Review Denied April 4, 1997, Reported at: 1997 Wash. LEXIS 176.

1995

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1994

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1993

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